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No. 98719-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER

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I. INTRODUCTION

We live in times of political unrest. Many Americans have lost faith in the government's ability to hear their voices, and some of the most pointed criticisms of American government have been directed at the criminal legal system. The ability of criminal defendants to defend themselves and a jury of peers to hear them, particularly in cases involving political protest on momentous issues, is now more important than ever.

Mr. Taylor was arrested for an act of civil disobedience to address the global ecological emergency, one of many such acts by Americans over the last decade. Although scientists have repeatedly warned that climate change — caused primarily by the combustion of fossil fuels — may send the world into a state of runaway heating, political leaders have done little to abate the problem. Though perhaps the gravest, climate change is far from the only threat to Americans' well-being to which our political system has failed to adequately respond. The function of civil disobedience as a safety valve for a system under strain is now more needed than ever, and the necessity defense is part of that safety valve.

This Court should reverse the decision of the Appeals Court and reinstate the trial court decision allowing Mr. Taylor's proffered defense.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae, listed in Exhibit A, are professors who teach and research in the areas of constitutional law, criminal law and procedure, civil rights and civil liberties law, environmental law, and the law of evidence. *Amici* include practitioners with extensive experience litigating in the above areas and in defending the rights of individuals engaged in protest. They offer their understanding of the history and use of the necessity defense; the constitutional issues raised by Mr. Taylor's appeal; and the public policy issues informing recent political unrest, including the environmental crisis. *Amici* believe that the outcome of the appeal will have important consequences for freedom of expression, the protection of criminal defendants' constitutional rights, and the balance between judges and juries in the adjudication of criminal trials.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Mr. Taylor's Motion for Discretionary Review.

IV. ARGUMENT

A. THE NECESSITY DEFENSE CONTINUES TO PLAY AN IMPORTANT ROLE IN AMERICAN POLITICAL HISTORY.

The necessity defense has been widely employed in prosecutions for acts of nonviolent civil disobedience in the United States. Since the

1970s, hundreds of individuals representing a variety of causes have been acquitted by reason of necessity.¹ The use of “political necessity” defenses

¹ Despite the large number of successful political necessity defenses, there are few reported decisions upholding the right to present the defense to the jury, because courts are usually not called upon to issue an opinion in such cases, and acquittals are not appealable. However, in at least two unreported Washington cases, which the court may consider pursuant to GR 14.1(a), protesters were acquitted after a necessity instruction to the jury. See *Washington v. Heller*, PL-151/69 (Seattle Mun. Ct. Aug. 7, 1985) (defendants acquitted of trespass at home of South African consul during apartheid protest); *Washington v. Bass*, PL-219/73, Nos. 4750-038, -395 to -400 (Thurston Cty. Dist. Ct., Apr. 8/Nov. 9, 1987) (defendants acquitted after being arrested for a sit-in in support of South Africa divestment legislation at the state Capitol). An incomplete list of other successful political necessity defenses might also include: *Massachusetts v. Schaeffer-Duffy* (Worcester Dist. Ct. 1989) (protesters acquitted of trespass at a nuclear facility after necessity instruction); *Massachusetts v. Carter*, No. 86-45 CR 7475 (Hampshire Dist. Ct. 1987) (defendants, including President Carter’s daughter, acquitted of trespass and disorderly conduct in protest against CIA recruitment after necessity instruction); *Washington v. Mouer* (Columbia Co. Dist. Ct., Dec. 12-16, 1977) (protesters acquitted of trespass at nuclear site after instruction on necessity); *California v. Block* (Galt Judicial Dist., Sacramento Co. Mun. Ct., Aug. 14, 1979) (one defendant acquitted of charges from protest at nuclear plant after necessity instruction, other defendants received split verdict and charges dropped); *California v. Lemnitzer*, No. 27106E (Pleasanton-Livermore Mun. Ct. Feb. 1, 1982) (hung jury for protester at nuclear research facility after instruction on necessity, at retrial no necessity instruction but instruction on malice); *Vermont v. Keller*, No. 1372-4-84-CNCR (Vt. Dist. Ct. Nov. 17, 1984) (defendants acquitted of trespass in congressman’s office to protest policy in Central America after extensive testimony and necessity instruction); *Michigan v. Jones et al.*, Nos. 83-101194-101228 (Oakland County Dist. Ct. 1984) (defendants acquitted of charges related to blockade of cruise missile site after necessity instruction); *People v. Jarka*, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15, 1985) (protesters acquitted after sit-in at naval training center to protest Central American policy when court gave necessity instruction that noted illegality of nuclear war); *Chicago v. Streeter*, Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct., Cook County 11, May 1985) (defendants acquitted of trespass at office of South African consul after necessity instruction); *Colorado v. Bock* (Denver County Ct. June 12, 1985) (protesters acquitted of trespass at senator’s office to protest policy in Central America after necessity instruction); *Michigan v. Lagrou*, Nos. 85-000098, 99, 100, 102 (Oakland County Dist. Ct. 1985) (defendants acquitted of charges related to blockade of cruise missile site, court noting absence of malice and absence of alternative methods); *Illinois v. Fish* (Skokie Cir. Ct. Aug. 1987) (protesters acquitted of trespass at an army recruiting center after necessity instruction); *California v. McMillan*, No. D 00518 (San Luis Obispo Jud. Dist. Mun. Ct., Cal. Oct. 13, 1987) (protesters acquitted on theory of necessity in bench trial related to demonstration at nuclear plant); *West Valley City v. Hirshi*, No. 891003031-3 MC (Salt Lake County, Ut. Cir. Ct., W. Valley Dept. 1990) (protesters at nuclear missile plant acquitted after necessity instruction); *California v. Halem*, No. 135842 (Berkeley Mun. Ct. 1991) (defendant acquitted of distributing clean

reflects not only the fact that protest actions often prevent serious harm through less-harmful law-breaking, but also the important role that civil disobedience plays in the nation's social progress. Judge Bright of the Eighth Circuit, dissenting in a case where anti-war protesters were convicted on several charges for damaging missile equipment, wrote:

We must recognize that civil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protestors' views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800's . . . In these circumstances, the courts in assessing punishment for violation of laws have ordinarily acted with a degree of restraint as to the severity of the punishment, recognizing that, although legally wrong, the offender may carry some moral justification for the disobedient acts.

United States v. Kabat, 797 F.2d 580, 601 (8th Cir. 1986).

Given the dearth of published opinions, and in light of how recent is the use of the necessity defense in climate protest cases, proponents' record of success in introducing the climate necessity defense at trial is impressive. Excluding the trial court opinion in this case, eight courts in the United States and three courts abroad have allowed climate protest

needles in response to AIDS crisis after necessity instruction); *People v. Bordowitz*, 155 Misc.2d 128 (N.Y.C. Crim. Ct. 1991) (defendants acquitted of distributing clean needles in response to AIDS crisis on necessity defense); *People v. Gray*, 150 Misc.2d 852 (N.Y.C. Crim. Ct. 1991) (defendants acquitted on necessity defense in bench trial after protest against pollution and safety effects of new vehicular lanes).

defendants to present necessity defenses since 2008, out of roughly thirty-seven attempts. See Climate Defense Project, *Climate Necessity Defense Case Guide* (Dec. 29, 2020), <https://climatedefenseproject.org/wp-content/uploads/2020/12/CDP-Climate-Necessity-Defense-Case-Guide.pdf>.² The first acquittal using the necessity defense prompted praise from former Vice President Al Gore. Mot. Discretionary Review, App. H at 7. These trends have not escaped notice by the fossil fuel industry, which since 2017 has embarked on a nationwide effort to secure harsh new penalties for protests at oil and gas sites. See Institute for Policy Studies, *Muzzling Dissent: How Corporate Influence Over Politics Has Fueled Anti-Protest Laws* (Oct. 2020), <https://ips-dc.org/report-muzzling-dissent/>.

² A number of these cases have taken place in Washington, with its significant fossil fuel infrastructure and proximity to Canadian suppliers and Asian markets. Here is a full list of cases of which *amici* are aware: *R. v. Hewke* (Maidstone Crown Court, UK, No. T20080116, Sep. 8, 2008); *Florida v. Block* (Fifteen Dist. Ct., Palm Beach Cty. Ct., Fla., 08MM003373AMB, Dec. 4, 2008); *Massachusetts v. O'Hara* (Fall River Dist. Ct., MA, No. 1332CR593, Sep. 8, 2014); *State v. Brockway*, 3 Wash.App.2d 1064, *review denied*, 191 Wash.2d 1020 (2018); *Minnesota v. Klapstein* (Ninth Jud. Dist. Ct. Clearwater Cty., Minn., No. 15-CR-16-413, Oct. 9, 2018) (scope of allowed necessity evidence narrowed by subsequent ruling); *State v. Ward*, 8 Wn.App.2d 365, 368, *review denied*, 193 Wn.2d 1031 (2019); *New York v. Cromwell* (Town of Wawayanda Justice Court, N.Y., No. 15120561, June 13, 2019); *State v. Delahalle* (Tribunal de Grande Instance de Lyon, 19168000015, Sep. 16, 2019); *Lausanne Climate Action* (Tribunal d'Arrondissement de Lausanne, PE 19.000742, Jan. 13, 2020); *Oregon v. Butler* (Multnomah Cty. Cir. Ct., Ore. No., 19-CR-28017, Feb. 27, 2020); *State v. Zepeda*, No. 80593-2-1 (Wash. Ct. App. Nov. 16, 2020). In several cases, following rulings to allow the necessity defense, or motions or notice from defense counsel seeking to present it, charges were dropped or reduced before trial took place. See *Climate Necessity Defense Case Guide* 7, 9, 10, 12, 18-19. The court may consider the unpublished cases in this list pursuant to GR 14.1(a).

**B. THE AIRING OF DEFENSES FOR WHICH THERE
IS PRIMA FACIE EVIDENCE IS ESSENTIAL TO
TRIAL BY JURY.**

The *amicus curiae* brief filed with the Court of Appeals explained why efforts to secure wholesale exclusion of a criminal defense prior to trial are incompatible with constitutional guarantees. Here, *amici* briefly note authorities not discussed previously.

In *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984), the defendants were political activists who had sought to present defenses of necessity and “claim of right.” The state moved prior to trial to bar them from doing so. In reinstating the trial court’s denial of the state’s motion, the state supreme court noted that “[t]he use of a motion in *limine* against a defendant in a criminal case, particularly one as broad in scope as in this case, is questionable considering the constitutional rights of defendants. . . . We . . . disapprove of so broad an exclusionary order as employed in this case against a criminal defendant because it raises serious constitutional questions relating to a defendant’s right to testify.” *Id.* at 748, 751.

In cases of justification and self-defense, where the essential purpose and context for a defendant’s actions is contained within the defense, it is particularly unfair to bar it outright at trial. Thus, for instance, at least one legislature has explicitly allowed the presentation of evidence relevant to self-defense even where a jury instruction on such a

defense has been denied, *see* Colo. Rev. Stat. Ann. § 18-1-704 (“In a case in which the defendant is not entitled to a jury instruction regarding self-defense . . . the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense.”); in other states, courts’ rulings have had a similar effect, *see, e.g., Commonwealth v. O’Malley*, 439 N.E.2d 832, 838 (Mass. App. Ct. 1982) (“In the usual case . . . it is far more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense.”); *see also* Mot. Discretionary Review App. H at 18-19.

Constitutional guarantees are not only meant to protect criminal defendants; they also help prevent courts from turning *jurors* into potted plants. The jury does more than find facts; it acts as a representative of the community, and its role is especially important in cases where the societal interest is in the balance:

That the defendants should be allowed to present their defense is required by a proper respect for the role of the jury in the criminal justice system. The essential purposes of the jury trial are twofold. First, the jury temper the application of strict rules by bringing the common sense judgment of a group of laymen to the case. Second, the jury stand as a check on arbitrary enforcement of the law. ‘Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.’

Commonwealth v. Hood, 452 N.E.2d 188, 198 (Mass. 1983) (Liacos, J., concurring) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). Cases in which protest defendants have argued necessity defenses at trial demonstrate jurors' ability to weigh the evidence and reach a decision without unduly favoring the defendant. *See, e.g., State v. Zepeda*, No. 80593-2-I, 2020 WL 6708240 (Wash. Ct. App. Nov. 16, 2020) (oil pipeline protest defendant convicted of burglary, attempted criminal sabotage, and malicious mischief following necessity defense at trial).³

**C. THE REVIEWING COURTS ERRED IN REACHING
FACTUAL CONCLUSIONS AND ADDING LEGAL
RULES UNSUPPORTED BY CASE LAW.**

Mr. Taylor's Motion for Discretionary Review describes the errors made by the reviewing courts in creating, in effect, a new legal rule not provided in the necessity defense as formulated in Washington common law or as provided in Washington case precedent, and premised on unsupported factual assumptions. *Amici* wish to add that the reviewing courts' reasoning — particularly the Appeals Court's assertions that

³ For another political protest case involving facts similar to those of *Kabat*, see Judge Bright's discussion of the unreported case *United States v. LaForge and Katt*, Cr. 4-84-66, slip at 20 (D.Minn. November 8, 1984). *Kabat*, 797 F.2d at 593 n. 4 (Bright, J., dissenting). In *LaForge*, the judge allowed anti-nuclear weapons protesters to present a necessity defense at trial. The jury convicted the defendants and the judge delivered a speech at sentencing praising the protesters' motives. *Id.*; *see also* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring it to the Jury*, 38 New England L. Rev 3, 40 n. 136 (2003). The court may consider both *Zepeda* and *LaForge* pursuant to GR 14.1(a).

“[t]here are always reasonable legal alternatives to disobeying constitutional laws,” that “a defendant is not entitled to receive a jury instruction that violating the law is permitted,” and that the necessary defense is “tantamount to promoting jury nullification,” *State ex rel Haskell v. Spokane County District Court*, 13 Wn.App.2d 573, 586, 587 (2020) — is troubling. Following this reasoning would eviscerate the necessity defense not just in political protest cases but in all others as well. The young African Americans who sat at lunch counters in 1960 disobeyed laws that were then constitutional. The hiker who breaks into a cabin to survive a snowstorm violates a constitutional law.

Amici also note that the necessity defense cannot be cabined without case-by-case analyses of the facts (analyses that the elements of the defense readily invite). Rather than legislate new rules categorically barring the necessity defense in certain cases — such as in cases of so-called “indirect” civil disobedience, a nonsensical category that excludes many real-life protests that changed the course of history⁴ — courts are called upon to consider the defendant’s proffered evidence.⁵

⁴ The *Schoon* distinction between “direct” and “indirect” civil disobedience, *United States v. Schoon*, 971 F.2d 193, 195-99 (9th Cir. 1991), *as amended* (Aug. 4, 1992), has been criticized by commentators on the grounds that it misunderstands the history of American civil disobedience, in which relatively few protesters have directly violated objectionable statutes. See Quigley, *The Necessity Defense in Civil Disobedience Cases* at 47. *Schoon* has been further criticized for assuming erroneously that lawful alternatives are always available, see John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 *Pierce L. Rev.* 111, 116 (2007), and for failing to account for a defendant’s

**D. THE REASONABLENESS OF LEGAL
ALTERNATIVES CANNOT BE DIVORCED FROM
THE FACTUAL CONTEXT OF THE CASE.**

The reviewing courts erred in reaching factual conclusions reserved for the jury. However, since some factual analysis by this Court is necessary, *amici* wish to note that the reviewing courts' findings are erroneous, insofar as they misinterpret Washington law, ignore key facts and evidence, and apply identical facts inconsistently.

1. “Reasonable” Has Meaning Beyond “Available.”

Reasonable alternatives to law-breaking are not limited to those that are effective immediately or in every case. However, reasonableness does require significant potential for effectiveness. As the comments to the Pattern Jury Instructions make clear, the use of the word “reasonable” is deliberate, and constitutes a distinct requirement. 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 18.02, at 292 (4th ed. 2016), Committee Cmt. 2016. In *State v. Parker*, Division II interpreted “reasonable” to mean that the defendant “had actually tried the alternative or had no time to try it, *or that a history of futile attempts revealed the*

constitutional right to present a complete defense, *see* James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 Cal. L. Rev. 351, 352 (1993). The First Circuit declined to adopt *Schoon*'s indirect-direct civil disobedience distinction in *United States v. Maxwell*. 254 F.3d 21, 26 n.2 (1st Cir. 2001).

⁵ Doing so does not require that courts undertake extensive analyses, since the bar for pre-trial evidentiary showings is low. *See* Supp. Br. Pet'r. 12-13.

illusionary benefits of the alternative.” 127 Wn.App. 352, 355 (2005) (emphasis added). In *State v. Jeffrey*, Division III assessed reasonableness in terms of the adequacy of the defendant’s alternative of calling the police in an unlawful possession of firearm case. 77 Wn.App. 222, 227 (1995). “Reasonable,” in these cases, has meant that a legal alternative might justifiably be expected under the circumstances to be an adequate substitute for the illegal one chosen by the defendant.

The reasonableness requirement is a common-sense safeguard also found in other jurisdictions. *See, e.g., People v. Gray*, 150 Misc.2d 852, 860 (N.Y. Crim. Ct. 1991) (finding that the defendants’ history of unsuccessful attempts to minimize air pollution demonstrated that lawful avenues were ineffective). *See also* Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1179-80 (1987) (“Reasonable must mean more than available; it must imply effective.”); Shaun Martin, *The Radical Necessity Defense*, 73 U. Cin. L. Rev. 1527, 1586 and n. 259 (2005) (“[T]he issue is not whether a lawful option exists; rather, it is whether any such alternative would effectively mitigate the forthcoming evil . . . Doing nothing, for example, is almost always a perfectly legal alternative, as is staring into space or pondering the purpose of life.”).

Further supporting the conclusion that “reasonable” means more than “available,” many courts have inferred from the reasonableness requirement that a defendant need not have exhausted *every* alternative. *See, e.g., Commonwealth v. Magadini*, 52 N.E.3d 1041, 1050 (Mass. 2016) (“Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.”); *State v. Greenwood*, 237 P.3d 1018, 1026 (Ak. 2010) (finding that a defendant “is not required to present evidence that every possible alternative was unavailable to her”); *People v. Gray*, 150 Misc.2d at 860-66 (rejecting idea that necessity defense must be excluded simply because the defendant could have tried “just one more alternative”).

2. Reasonableness Depends Upon the Nature of the Harms the Defendant Sought to Abate.

Any assessment of the effectiveness or futility of legal alternatives must consider the severity of the harms and the timeframe for addressing them. Imminence is relevant: the more imminent the peril, the less likely that alternative courses of action will abate it. *See Kabat*, 797 F.2d at 591.

Courts considering the effects of climate change have consistently concluded that its harms are imminent (and, indeed, are already occurring). *See, e.g., Connecticut v. American Electric Power Co., Inc.*,

582 F.3d 309, 343 (2nd Cir. 2009) (finding that the plaintiffs had sufficiently pled imminence due to the ongoing nature of climate change harms); *Massachusetts v. E.P.A.*, 549 U.S. 497, 521-23 (2007) (noting that “[t]he harms associated with climate change are serious and well recognized,” and that the EPA’s refusal to regulate greenhouse gas emissions was an imminent harm to Massachusetts); *Los Angeles v. N.H.T.S.A.*, 912 F.2d 478, 494 (D.C. Cir. 1990) (Wald, J., Opinion for the Court on NRDC standing and dissenting on the failure to issue an EIS) (“No one, including NHTSA, appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming.”).

Imminence may refer to harms that are likely to occur but cannot be precisely predicted, as with many environmental threats. In *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007), a tar-like by-product of an oil refinery was an imminent hazard even though no one had yet been harmed by it: “[A]n ‘imminent hazard’ may be declared at any point in a chain of events which may ultimately result in harm to the public . . . Imminence, thus, refers to the nature of the threat rather than identification of the time when the endangerment initially arose” (citations omitted). In *People v. Gray*, a case involving protests against air pollution, the court rejected the argument that the targeted harm

had to be immediate and easily quantifiable, since there is a wealth of scientific proof that air pollution harms human health. 150 Misc.2d at 862.

Mr. Taylor did not seek single-handedly to “prevent climate change” as a whole, Supp. Br. Resp’t. 8; he sought to reduce coal and oil train traffic through Spokane, and thus the risk of accidents, and to generate political will for a more-permanent solution to those trains’ contribution to climate and pollution harms, *see* CP 159. Ecological degradation from the burning of fossil fuels is grave, ongoing, and rapidly worsening. CP 10-11, 61-75. The window of opportunity for keeping those harms within acceptable limits is closing fast. CP 75. Moreover, accidents and spills are a serious risk endemic to the operation of coal and oil trains, including those traveling through Spokane. CP 13. Mr. Taylor has made more than a *prima facie* showing that these harms are emergencies in need of quick and decisive action, and that such realities constrained the options available to him.

3. Democratic Dysfunction Has Rendered Traditional Means of Political Participation Ineffectual for Ordinary Americans.

Mr. Taylor was not presented with a democratic process that simply works too slowly for citizen activists impatient to see their political views vindicated. Rather, he faced state and federal governments that are now for most purposes structurally committed to representing only the

wealthy and well-funded interest groups. *See generally* Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2014) (showing zero statistical correlation between enacted federal policies and those preferred by ordinary Americans, versus a strong correlation with those preferred by wealthy citizens and business interests).⁶ The discrepancy between ordinary Americans' preferred policies and those actually enacted is especially acute in the realm of business regulation. Lee Drutman, *Congress has very few working class members. Here's why that matters*, Sunlight Foundation (June 3, 2014), <https://sunlightfoundation.com/2014/06/03/white-collar-government/>. Meanwhile, winning election to public office has become too expensive for most citizens. *Id.*⁷

In Washington State, the Department of Ecology has testified in a court of law that it would be “futile” to make a recommendation to the Legislature to update existing greenhouse gas emission limits, even though it is statutorily obligated to do so. *See Foster, et al. v. Ecology*, King

⁶ *See also* Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40(1) *American Politics Research* 29 (2012) (finding that “citizens with low incomes receive little substantive political representation (compared with more affluent citizens) in the policy decisions made by their state governments”); Nicholas Carnes, *White-Collar Government: The Hidden Role of Class in Economic Policy Making* (2013) (showing that the class backgrounds of elected representatives distorts policy).

⁷ Elected representatives from working-class backgrounds comprise just two percent of the United States Congress and three percent of state legislatures, and this owes in part to the high cost of running a campaign. Drutman, *Congress has very few working class members*. In 2014, “[m]ore than half of sitting members of Congress [had] \$1 million or more to their names.” *Id.* (internal citation omitted).

County Superior Court No. 14-2-25295-1 SEA (Dep't of Ecology Resp. to Pet.'s Mot. for Relief Under CR 60(b)) (filed Apr. 19, 2016) (App. C) at 6 (“Ecology believes any attempt to persuade the 2016 Legislature to change the emission limits in RCW 70.235 would have been futile.”).

Fossil fuel corporations donate generously to political campaigns in Washington State, and those donations appear to be correlated with the policy records of candidates who receive them. Eric de Place & Nick Abraham, *Which Washington Legislators Take the Most Coal, Oil, and Gas Money?*, The Sightline Institute (Jan. 15, 2015), <https://www.sightline.org/2015/01/15/which-washington-legislators-take-the-most-coal-oil-and-gas-money/>. Fossil fuel corporations also influence Washington politics through less-transparent means, including lobbyists and political action committees. Eric de Place & Nick Abraham, *Coal, Oil, and Gas Spent \$3 Million on Washington Politics in 2014*, The Sightline Institute (Mar. 10, 2015), <https://www.sightline.org/2015/03/10/3-million-in-fossil-fuel-spending-flooded-washington-in-2014/>.

Of particular relevance to this case, fossil fuel and railroad companies spent at least \$358,000 to defeat Proposition 2, a 2017 ballot initiative that would have levied a fee on coal and oil trains passing through Spokane. Public Disclosure Commission, *Comm to Protect Spokanes Economy, 2017*, <https://www.pdc.wa.gov/browse/campaign->

[explorer/committee?filer_id=COMMP5%20201&election_year=2017;](https://www.knkx.org/post/goliath-spending-effort-blamed-failure-spokane-coal-oil-train-ballot-measure)

Emily Schwing, *'Goliath' Spending Effort Blamed for Failure of Spokane Coal, Oil Train Ballot Measure*, KNKX.org (Nov. 8, 2017), <https://www.knkx.org/post/goliath-spending-effort-blamed-failure-spokane-coal-oil-train-ballot-measure>. This defeat occurred during an election in which the fossil fuel industry spent nearly \$100 million to stymie three proposed climate initiatives in Western states: a carbon emissions fee in Washington, restrictions on hydraulic fracturing in Colorado, and improved renewable energy standards in Arizona. Amy Harder, *With deep pockets, energy industry notches big midterm wins*, Axios (Nov. 7, 2018), <https://www.axios.com/2018-midterm-elections-energy-issue-results-83978294-55b4-4ebc-88c4-842a6e0f0c4e.html>.

In a similar necessity defense case involving a protest against oil trains in Snohomish County, expert trial testimony described decades of failed attempts to spur governmental action to make crude oil transport safer, while defendant Abigail Brockway described her unsuccessful correspondence with elected officials and testimony before the Department of Ecology. *See* Verbatim Tr. Proceedings Vol. 3, *Washington v. Brockway* (Snohomish Co. Dist. Ct., Wash., No. 5053A-14D) (App. D) at 63-72, 91-93, 102-119, 121-25. In the *Ward* case, defendant Kenneth Ward testified to his disillusionment about the prospects of governmental

action to address climate change and crude oil transport after forty years as a leading advocate on environmental issues at high-powered organizations. *See* Jan. 24, June 5 & June 6, 2017 RP, *Washington v. Ward* (Skagit Co. Sup. Ct., Wash., No. 16-1-01001- 5) (App. E) at 90-115.

These realities give context to Mr. Taylor’s testimony describing numerous failed attempts to activate political levers, CP 141-44, and his argument that political avenues were functionally unavailable to him. It is unrealistic to expect Mr. Taylor and his fellow advocates to secure political leadership when their own and other similar efforts have failed for decades. While theoretically available, political avenues are in fact illusionary and should not be cited to deny Mr. Taylor’s necessity defense.

4. Facts Governing the Objective Reasonableness of the Defendant’s Belief May Not Be Discarded When Analyzing Available Alternatives.

The second element of the necessity defense requires that the defendant “reasonably believed the commission of the crime was necessary to avoid or minimize a harm.” *State v. Ward*, 8 Wn.App.2d 365, 368, *review denied*, 193 Wn.2d 1031 (2019); 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 18.02, at 292 (4th ed. 2016). This element incorporates not just a defendant’s subjective belief in the necessity of her action, but whether that belief was objectively reasonable. *See, e.g., State v. Gallegos*, 73 Wn.App. 644, 651 (1994)

(finding that the defendant’s “belief that he had to flee from [a police officer] so the officer would follow him and help him assist [a friend]” was objectively unreasonable).⁸ The fourth element of the defense is that no reasonable legal alternative existed. *Ward*, 8 Wn.App.2d at 368.

Here, nearly all of Mr. Taylor’s evidence — the imminence and severity of the environmental dangers posed, the efficacy of nonviolent civil disobedience, and previous attempts by Mr. Taylor and others to reduce train traffic through Spokane using political mechanisms, CP 8-13 — addressed both the second and fourth elements. Nonetheless, in its de novo review the Appeals Court found that the evidence satisfied the second element but not the fourth. *Haskell*, 13 Wn.App.2d at 579, 584.

Proving the second element does not always prove the fourth. However, when the evidence supporting the two elements is identical, its treatment should be consistent. Evidence of ecological crisis and

⁸ Judge Fearing’s observation that “Washington law has never directly addressed” this question, *Haskell*, 13 Wn.App.2d at 611 (Fearing, J., dissenting), is not inaccurate. *Jeffrey* omitted the word “reasonably.” See 889 P.2d at 957-58. However, *amici* believe that the reasonableness requirement can be inferred from other cases and the fact that most interpretations of the necessity defense in other jurisdictions contain an objective test. See, e.g., *People v. Kucavik*, 854 N.E.2d 255, 259 (Ill.App. 2006) (finding that the Illinois necessity statute “creates both an objective and subjective test for the reasonableness of the accused’s conduct under the circumstances”); *United States v. Seward*, 687 F.2d 1270, 1273 (10th Cir. 1983) (necessity defense requires “a showing that a reasonable man would think that” the defendant’s conduct averted the targeted harm). See also Climate Defense Project, *Political Necessity Defense Jurisdiction Guide* (July 8, 2019), <https://climatedefenseproject.org/wp-content/uploads/2019/07/Political-Necessity-Defense-Jurisdiction-Guide-Updated-July-2019.pdf>. To help ensure the objective reasonableness of a defendant’s belief, a large number of jurisdictions require a causal nexus between breaking the law and preventing the harm. See *id.* Finally, public policy calls for assessing objective reasonableness, so as to cabin the necessity defense.

democratic dysfunction that establishes the objective reasonableness of a defendant's actions may not be discounted when analyzing the reasonableness of alternatives. The reviewing courts were required to do more than make conclusory statements premised on the mere existence of democratic institutions without regard for the evidence proffered.⁹

V. CONCLUSION

Time and again, Mr. Taylor and others like him told political leaders of their concerns about trains carrying coal and oil. Their efforts fell on deaf ears. In turning to nonviolent civil disobedience, Mr. Taylor and his compatriots chose a time-tested strategy for exercising political power by those who have little. Mr. Taylor accepted serious legal risks for the sake of calling attention to dangers imperiling the well-being not only of Spokane residents, but of all humanity. He now seeks to explain and justify his actions to a jury.

The undersigned *amici curiae* respectfully request that this Court reinstate the trial court decision allowing Mr. Taylor to do so.

Respectfully submitted this 4th day of January, 2021,

/s/ Alice Meta M. Cherry
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⁹ That evidence includes the defense memorandum on the necessity defense submitted to the trial court, which is not contained in the appellate record. *See* Defense Mot. Allow Affirmative Defense (App. F).

CERTIFICATE OF SERVICE

I certify that on the date listed below, I served a copy of this amicus brief on counsel for the State of Washington via the electronic filing system, and by email at the address shown below:

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APPENDIX A

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No. 98719-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

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APPENDIX B

11 Washington Practice: Washington Pattern Jury
Instruction: Criminal 18.02 (4th ed. 2016)

WPIC § 18.02

Necessity is a defense to a charge of (fill in crime) if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and the
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

Necessity—Defense, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.02 (4th Ed)

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APPENDIX C

Department of Ecology Response to Petitioner's Motion for Relief
Under CR 60(b) (filed Apr. 19, 2016), *Foster, et al. v. Ecology*, King
County Superior Court No. 14-2-25295-1 SEA

The Honorable Hollis R. Hill

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY
RESPONSE TO PETITIONERS'
MOTION FOR RELIEF UNDER
CR60(B)

ZOE & STELLA FOSTER, minor
children by and through their guardians
MICHAEL FOSTER and MALINDA
BAILEY; AJI & ADONIS PIPER,
minor children by and through their
guardian HELAINA PIPER; WREN
WAGENBACH, a minor child by and
through her guardian MIKE
WAGENBACH; LARA FAIN, a minor
child by and through her guardian
MONIQUE DINH; GABRIEL
MANDELL, a minor child by and
through his guardians VALERIE and
RANDY MITCHELL; JENNY XU, a
minor child by and through her
guardians YAN ZHANG &
WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY,

Respondent.

I. INTRODUCTION

On November 19, 2015, this Court issued its decision dismissing Petitioners' complaint in this matter because the Washington State Department of Ecology (Ecology) was acting on Governor Inslee's July 28, 2015 directive to adopt a rule to reduce carbon dioxide emissions in

1 Washington. Petitioners now ask the Court to vacate that ruling based on two very different
2 claims against Ecology. The first claim is that Ecology, without justification, allegedly
3 abandoned the process to adopt a rule limiting carbon dioxide emissions in Washington. This
4 claim is not true. Ecology continues to be diligently developing a rule to limit carbon dioxide
5 emissions in Washington and is on track to adopt a rule by the end of 2016. Petitioners'
6 second claim is that Ecology did not make a recommendation to the Legislature to change the
7 greenhouse gas limits in RCW 70.235.020. This second claim, even though true, provides no
8 basis for relief, because whether or not Ecology made such a recommendation was not material
9 to the Court's November decision. Petitioners' Rule 60(b) motion is without merit and should
10 be denied.

11 II. ARGUMENT

12 A. Standard of Review and Burden of Proof

13 As a general rule, a motion under Civil Rule (CR) 60 is a motion to vacate, not a
14 motion to modify the substance of the judgment because circumstances have changed. 15
15 Karl B. Teglund, *Washington Practice: Civil Procedure* § 39:13 (2d ed. 2015). The remedy
16 under CR 60 is limited to vacating the judgment or order in question. *Id.* In a proceeding
17 under CR 60, the court cannot grant affirmative relief. *Geonerco, Inc. v. Grand Ridge*
18 *Properties IV, LLC*, 159 Wn. App. 536, 248 P.3d 1047 (2011).

19 In this case, Petitioners bring their claims under CR 60(b)(4), which provides post-
20 judgment relief for fraud or misrepresentation, and CR 60(b)(11), which provides post-
21 judgment relief for "[a]ny other reason justifying relief from the operation of the judgment."
22 CR 60(b)(11). "The party attacking a judgment under CR 60(b)(4) must establish the fraud,
23 misrepresentation, or other misconduct by clear and convincing evidence." *Lindgren v.*
24 *Lindgren*, 58 Wn. App. 588, 596, 794 P. 2d 526 (1990); see also *Peoples State Bank v. Hickey*,
25 55 Wn. App. 367, 371, 777 P. 2d 1056 (1989). "Relief under Civil Rule 60(b)(11) is confined
26 to situations involving extraordinary circumstances not covered by any other section of the

1 rule.” *Summers v. Dep’t of Revenue*, 104 Wn. App. 87, 93, 14 P.3d 902 (2001), citing *In Re*
2 *Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998), review denied, 137 Wn.2d
3 1023, 980 P.2d 1282 (1999).

4 “In order to prove fraud, the plaintiff must establish each of the following elements by
5 clear, cogent, and convincing evidence: (1) A representation of an existing fact; (2) its
6 materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5)
7 his intent that it should be acted on by the person to whom it is made; (6) ignorance of its
8 falsity on the part of the person to whom it is made; (7) the latter’s reliance on the truth of the
9 representation; (8) his right to rely upon it; (9) his consequent damage.” *Kirkham v. Smith*, 106
10 Wn. App. 177, 183, 23 P.3d 10 (2001). Misrepresentation is defined as “The act of making a
11 false or misleading statement about something, usually with the intent to deceive.” *Black’s*
12 *Law Dictionary* 813 (Abridged 7th ed. 2000), entry for “misrepresentation.”

13
14 **B. Ecology’s August 7, 2015 Statement Concerning Rulemaking and the Rulemaking
Timeline Remain Accurate**

15 In responding to the June 23, 2015 order from this Court, Ecology made the statement
16 quoted by Petitioners, that the agency was “committed to initiating the formal Administrative
17 Procedure Act rulemaking process in 2015, and adopting a final rule by the end of 2016.”
18 Ecology Response to June 23, 2015 Court Order (August 7, 2015) at 9; Petitioners’ Rule 60(b)
19 Motion for Relief from Judgment (Petitioners’ Motion) at 6. Petitioners claim that Ecology
20 has failed to follow through on this commitment. Petitioners’ Motion at 2.

21 Despite Petitioners’ claim to the contrary (Petitioners’ Motion at 8), Ecology’s
22 statement to the Court remains accurate. Ecology initiated formal rulemaking in 2015. Second
23 Declaration of Sarah Louise Rees (Second Rees Decl.) ¶ 5, Ex. A. Ecology filed a proposed
24 rule with all required related documents on January 5, 2016. Second Rees Decl. ¶ 6, Ex. B.
25 On February 26, 2016, Ecology withdrew that proposed rule. Second Rees Decl. ¶ 8.
26 Petitioners seem to believe Ecology’s withdrawal of the proposed rule means Ecology has

1 abandoned the rulemaking process. *See, e.g.*, Petitioners' Motion at 2, 6, 11. Petitioners are
2 mistaken. Ecology withdrew the proposed rule because comments from stakeholders made it
3 clear that the rule needed substantial modifications. Second Rees Decl. ¶ 9.

4 Under the Administrative Procedure Act (APA), if an agency makes substantial
5 changes to a proposed rule, the agency must re-propose the rule and reopen the proceedings for
6 public comment. RCW 34.05.340(1). Once Ecology realized the rule would need substantial
7 changes, Ecology therefore withdrew the rule. Ecology withdrew the rule when it did rather
8 than waiting for the end of the public comment period (as allowed by the APA) for several
9 reasons. First, Ecology wanted to give the public notice as soon as possible that the agency
10 would be making substantial changes to rule language the public was at that time reviewing.
11 Second Rees Decl. ¶ 9. Second, the agency wanted to avoid holding public hearings on rule
12 language the agency knew would be substantially changing. *Id.* Finally, Ecology knew
13 withdrawing the rule earlier rather than later would be more efficient, and result in earlier
14 adoption of the rule. *Id.*

15 Since withdrawing the proposed rule, Ecology has continued to work vigorously on the
16 rule and remains on track to adopt the rule by the end of 2016. Second Rees Decl. ¶¶ 8, 10.
17 As part of its ongoing rulemaking effort, Ecology has scheduled a webinar for April 27, 2016,
18 to explain to stakeholders some of the changes the agency is considering making to the rule.
19 Second Rees Decl. ¶ 10, Ex C. Petitioners, as always, are free to participate in the webinar,
20 and provide their comments concerning the rule to Ecology.

21 Under these circumstances, there is no basis to claim that Ecology's actions are in any
22 way inconsistent with the statement made to the Court. Nor is there any basis for a claim that
23 Ecology's statement constitutes fraud or misrepresentation. Finally these circumstances
24 provide no basis for post-judgment relief under CR 60(b)(11), as Ecology is doing exactly
25 what it told the Court it would do.
26

1 **C. Ecology's Statement Concerning a Recommendation to the Legislature Does Not**
2 **Provide Grounds for Relief Under CR 60(b)**

3 Petitioners next point to Ecology's statement that "Ecology . . . will be ready to decide
4 what changes to Washington's limits [in RCW 70.235] are appropriate and recommend these
5 changes to the Legislature in 2016, shortly after the negotiations by the UNFCCC members are
6 concluded and the commitments by the various nations, including the United States, are
7 finalized." Petitioners Motion at 8, quoting a statement from the Declaration of Hedia
8 Adelsman ¶ 12. Petitioners correctly point out that Ecology did not make a recommendation to
9 the 2016 Legislature to change the limits in RCW 70.235. Petitioners' Motion at 8, 10.
10 Petitioners attempt to elevate this fact into grounds for relief under CR 60(b).¹ Petitioners'
11 Motion at 8, 10. Petitioners' attempt is without merit.

12 Nothing in the Court's November 19, 2015 order in this case can be construed as
13 requiring Ecology to make a recommendation to the Legislature. Nor does anything in the
14 Court's November 19, 2015 order indicate that its decision was based on Ms. Adelsman's
15 statement regarding a recommendation to the Legislature in 2016. To the contrary, the Court's
16 order makes it clear that the Court's decision was based on Ecology's commitment to adopt a
17 rule limiting carbon dioxide emissions in Washington. Order Affirming the Department of
18 Ecology's Denial of Petition for Rule Making (Court's Order) at 4, 7, 9, 10. As discussed
19 above, Ecology is actively engaged in adopting such a rule.

20 The need for an agency rule to limit greenhouse gas emissions was triggered by the fact
21 that the 2015 Legislature did not enact cap and trade legislation to address greenhouse gas
22 emissions. Declaration of Stuart Clark (Clark Decl.) Ex. B; Second Rees Decl. ¶ 11. Since
23 then, Ecology's top priority has been adopting a rule within existing state authority to get

24 ¹ Petitioners characterize Ecology's statement as a promise to make a recommendation to the Legislature
25 in 2016. It goes without saying that at this time, it is only April 2016, and more than half of 2016 is still to run.
26 Therefore, it is possible that, if circumstances warrant, Ecology could make a recommendation to the Legislature
in 2016.

1 emissions reductions now. Second Rees Decl. ¶ 11. By contrast, the law does not require the
2 state to perform a futile act (*see, e.g., State v. Smith*, 148 Wn.2d 122, 132, 59 P.3d 74 (2002);
3 *Music v. United Ins. Co. of Am.*, 59 Wn.2d 765, 768–69, 370 P.2d 603 (1962)), and Ecology
4 believes any attempt to persuade the 2016 Legislature to change the limits in RCW 70.235
5 would have been futile (Second Rees Decl. ¶ 11). Consequently, Ecology did not make a
6 recommendation to the 2016 Legislature to change the limits in RCW 70.235. Second Rees
7 Decl. ¶ 11.

8 Under these circumstances, Ecology’s decision not to make a recommendation to the
9 Legislature regarding the limits in RCW 70.235 does not provide grounds for relief under
10 CR 60(b).

11
12 **D. Petitioners Are Not Entitled to Relief Under CR 60(b)(4) for Fraud or Misrepresentation**

13 Petitioners claim that they are entitled to relief under CR 60(b)(4) for fraud or
14 misrepresentation. Petitioners’ Motion at 10. There is no evidence that either of the two
15 Ecology statements cited by Petitioners meets any of the elements required for fraud or
16 misrepresentation. There is no evidence that either of Ecology’s statements was false or that in
17 making these statements, Ecology intended to make false statements.²

18 Petitioners claim that the fact that a fraudulent act occurs after judgment does not bar
19 relief. Petitioners’ Motion at 7, citing *Suburban Janitorial Services v. Clarke American*, 72
20 Wn. App. 302, 863 P.2d 1377 (1993). However, Petitioners point to no fraudulent act that
21

22 ² Petitioners claim that there need be no evidence that Ecology intended to make a false statement
23 because innocent misrepresentation can also provide a basis for relief under CR 60(b)(4). Petitioners’ Motion at
24 9, citing *Peoples State Bank*, 55 Wn. App. at 371. Petitioners misunderstand the meaning of innocent
25 misrepresentation. Innocent misrepresentation is defined as “A false statement not known to be false; a
26 misrepresentation that, though false, was not made fraudulently.” *Black’s Law Dictionary* 813 (Abridged 7th ed.
2000), entry for “*innocent misrepresentation*.” Ms. Adelsman’s statement does not meet the definition of
innocent misrepresentation because her statement was a true statement at the time it was made. It was therefore
not a false statement not known to be false.

1 occurred after the Court's decision in this case.³ That is, Petitioners point to no false
2 statement, misrepresentation of the truth, or concealment of a material fact by Ecology after the
3 Court's decision in this case. Therefore, there is no fraud and no misrepresentation, and thus
4 no relief available to Petitioners under CR 60(b)(4).

5 **E. Petitioners Are Not Entitled to Relief Under CR 60(b)(11)**

6 Petitioners next claim that, even if relief is not available to them under CR 60(b)(4),
7 their claim warrants relief under CR 60(b)(11). Petitioners' Motion at 10–11. "Relief under
8 Civil Rule 60(b)(11) is confined to situations involving extraordinary circumstances not
9 covered by any other section of the rule." *Summers*, 104 Wn. App. at 93, citing *In Re*
10 *Marriage of Thurston*, 92 Wn. App. at 499, review denied, 137 Wn.2d 1023.

11 Courts have provided relief under CR 60(b)(11) when a material condition in an earlier
12 decision has not been met. *In Re Marriage of Thurston*, 92 Wn. App. at 503 (finding that the
13 award of property to former spouse was a material condition of the dissolution settlement and
14 that the nonoccurrence of that condition constituted extraordinary circumstances warranting
15 relief under CR 60(b)(11)). Here, however, the criteria for relief under this rule are not met,
16 because there is no material condition in the court's earlier order that has not been met.

17 The Court was very clear that its November decision was based on Ecology's
18 commitment to adopt a rule setting carbon dioxide emission limits in Washington. *See, e.g.,*
19 Court's Order at 4 ("Governor Inslee's directive requires Ecology to initiate a rulemaking to
20 set a regulatory cap on carbon dioxide emissions and to develop reductions in carbon dioxide
21 emissions using its existing authority. This rulemaking effort [ongoing rulemaking] has begun
22 and indications are that a rule will be enacted no later than the end of 2016."); 7 ("But, Ecology
23 is not failing to fulfill this obligation given that it is engaging in rulemaking under the directive

24
25 ³ A fraudulent act is the representation of an existing fact as false. *Kirkham*, 106 Wn. App. at 183. *See*
26 *also Black's Law Dictionary* 529 (Abridged 7th ed. 2000) entry for "*fraud*": fraud is "a knowing
misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

1 to establish standards for greenhouse gas emissions.”); 9 (“Now that Ecology has commenced
2 rulemaking to establish greenhouse emission standards taking into account science and [sic]
3 well as economic, social and political considerations, it cannot be found to be acting arbitrarily
4 or capriciously.”); 10 (“For the foregoing reasons, the petition for review is DENIED due to
5 the Department of Ecology having commenced the aforementioned rulemaking process as
6 directed by the Governor.”).

7 All the Court’s statements reference Ecology’s action to adopt a rule limiting
8 greenhouse gas emissions. Ecology continues to move forward on the rulemaking and is on
9 track to adopt a rule by the end of 2016. Therefore there is no basis for relief under
10 CR 60(b)(11).⁴

11 Petitioners make the serious allegation that Ecology has abandoned the rulemaking that
12 formed the basis for the Court’s decision in this case to uphold Ecology’s denial of Petitioners’
13 petition for rulemaking. As discussed in Section II.B. above, that allegation is false. Ecology
14 continues to vigorously engage in the rulemaking process, and is on track to adopt a rule by the
15 end of 2016 as promised. Therefore, Ecology’s actions concerning the rulemaking provide no
16 basis for post-judgment relief under CR 60(b).

17 Petitioners also allege that Ecology’s failure to make a recommendation to the
18 Legislature to change the greenhouse gas emission limits in RCW 70.235 provides a basis for
19 relief under CR 60(b). As discussed in Section II.C. above, the Court’s November 19, 2015
20 order in this case did not require Ecology to make such a recommendation to the Legislature.
21 Nor is there any evidence in that order that Ecology’s commitment to make such a

22
23 ⁴ Finally, it is not clear that, even if Petitioners’ claims had any merit, the Court could provide the relief they
24 request (a court-ordered timeline for Ecology to adopt the rule). As a general rule, a motion under CR 60 is a
25 motion to vacate, not a motion to modify the substance of the judgment because circumstances have changed.
26 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 39:13 (2d ed. 2015). The remedy under CR 60 is
limited to vacating the judgment or order in question. *Id.* In a proceeding under CR 60, the court cannot grant
affirmative relief. *Geonerco, Inc.*, 159 Wn. App. 536.

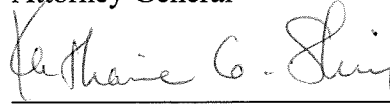
1 recommendation was a material condition in the Court's decision in this case. Therefore, the
2 fact that Ecology did not make such a recommendation does not provide grounds for relief
3 under CR 60(b).

4 III. CONCLUSION

5 As outlined above, because Ecology is diligently engaged in adopting a rule to reduce
6 carbon dioxide emissions in Washington, there is no basis for providing relief to Petitioners
7 under CR 60(b). Ecology therefore asks this Court to deny Petitioners' Motion for Relief
8 under CR 60(b) and decline to vacate the Court's previous judgment in this case.

9 DATED this 7th day of April 2016.

10 ROBERT W. FERGUSON
11 Attorney General

12 

13 KATHARINE G. SHIREY, WSBA #35736
14 Assistant Attorney General

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FILED
SUPREME COURT
STATE OF WASHINGTON
1/4/2021 12:03 PM
BY SUSAN L. CARLSON
CLERK

APPENDIX D

Verbatim Transcript of Proceedings Volume 3, *Washington v. Brockway*
(Snohomish Co. Dist. Ct., Wash., No. 5053A-14D, Jan. 13, 2016)

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SNOHOMISH COUNTY DISTRICT COURT, EVERETT DIVISION
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	Case 5053A-14D
Plaintiff,)	
)	
vs.)	
)	
ABIGAIL CASTLE BROCKWAY,)	
)	
ET AL.,)	
)	
Defendants.)	
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VERBATIM TRANSCRIPT OF PROCEEDINGS
OF
A TRIAL
BEFORE THE HONORABLE ANTHONY E. HOWARD
1/13/2016
Volume 3
APPEARANCES

For the State: Adam Sturdivant
For Defendant Brockway: Robert Goldsmith
For Defendant LaPointe: Evelyn Chuang
For Defendant Mazza: Appears Pro Se
For Defendant Minchew: Mary McCallum
For Defendant Spoerri: Bridge Joyce

Transcribed by Brian Killgore

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1 (Proceedings of 1/13/2016)

2 THE COURT: Good morning everyone. Please be
3 seated.

4 We are back on the record for day three of jury
5 trial in five consolidated cases, the lead case being
6 Abigail Brockway, 5035A14D.

7 Are the parties ready to proceed or are there any
8 preliminary motions or issues that we need to deal with
9 before bringing the jury in?

10 MR. STURDIVANT: Your honor, the state has
11 one issue.

12 THE COURT: Go ahead.

13 MR. STURDIVANT: Mr. Michael James
14 Stapleton --

15 (Cell phone goes off)

16 THE COURT: All right, everyone, that is a
17 signal.

18 Make sure all the sound is turned off on any
19 electronic devices, and again I will reiterate, no
20 photography of any kind without my explicit permission
21 in this room.

22 Please take a moment, even if it makes noise when
23 you turn your device off, do it right now.

24 It will be forgiven in this next few moments.

25 Mr. Sturdivant?

1 MR. STURDIVANT: Your honor, Special Agent --
2 Special Officer Michael Stapleton is still here holding
3 onto the evidence.

4 We haven't received any information that he was
5 cross-subpoenaed, or they were relying on our
6 subpoenas, and here he is sitting with the evidence,
7 which is a chain of custody issue.

8 My first question is what is the relevance of the
9 tube that Ms. Brockway used to put her arms under? It
10 has no relevance to whether she is trespassing or not,
11 and it has no relevance as to whether she is delaying a
12 train or not.

13 THE COURT: Well aren't you the one who
14 submitted the photo of her?

15 MR. STURDIVANT: I submitted the photo
16 because it has the cables in it, your honor.

17 THE COURT: It's still there in an exhibit
18 that is admitted in front of the jury, so I am hard-
19 pressed not to allow the defense to introduce the
20 actual object that was photographed, if they wish to do
21 that, so --

22 MR. STURDIVANT: It would be my hope we could
23 do that shortly.

24 THE COURT: I guess I would like to know if
25 they intend to do that? There is no reason to have --

1 MR. GOLDSMITH: We do, your honor. We do
2 intend to introduce that as well as some of the
3 contents of her backpack.

4 Now --

5 THE COURT: And that is -- and is she
6 testifying this morning?

7 MR. GOLDSMITH: Yes.

8 Well, she is going to testify today, yes.

9 THE COURT: And then -- why don't we have the
10 evidence marked and then it would be in the possession
11 of the court?

12 MR. STURDIVANT: Okay.

13 MR. GOLDSMITH: That's fine with us, your
14 honor.

15 MR. STURDIVANT: If that is the court's
16 order, that will be done.

17 I will go ahead and get him right now.

18 MR. GOLDSMITH: The whole backpack, please --
19 her whole backpack.

20 MR. STURDIVANT: I will get that right for
21 you, Bob.

22 MR. GOLDSMITH: Okay, thanks.

23 (Brief Pause in Proceedings)

24 THE COURT: We are still on the record,
25 folks. The mics are picking up everything you are

1 saying.

2 MR. GOLDSMITH: Sorry, your honor.

3 (Brief Pause in Proceedings)

4 THE COURT: All right, well these are going
5 to be your exhibits from the defense, so come up and
6 let the officer know what you want marked.

7 MR. GOLDSMITH: I will just take the whole
8 backpack from him and we will be good to go.

9 THE COURT: For the record, Officer Stapleton
10 brought these items in that include a backpack it looks
11 like full of items along with some sort of duct-taped
12 sleeve.

13 Do you want, Mr. Goldsmith, these items to be --
14 the items within the backpack to be individually marked
15 or marked as one exhibit?

16 MR. GOLDSMITH: I think one exhibit makes it
17 easier.

18 THE COURT: Fine with me.

19 Any objection from the state?

20 MR. STURDIVANT: No, your honor.

21 THE COURT: All right.

22 Madam Clerk, if you could mark exhibits -- Is it C
23 and D? -- for the defense?

24 THE CLERK: It is now M and N.

25 THE COURT: M and N. All right.

1 MR. GOLDSMITH: We have moved down the
2 alphabet, your honor.

3 MR. STURDIVANT: Your honor, at this time can
4 Special Officer Stapleton be released?

5 THE COURT: Any objection?

6 MR. GOLDSMITH: No objection.

7 THE COURT: Thank you, sir.

8 OFFICER STAPLETON: Thank you.

9 MR. STURDIVANT: Thank you. Take care.
10 Don't forget your computer.

11 OFFICER STAPLETON: Yes, sir.

12 (Brief Pause in Proceedings)

13 MR. GOLDSMITH: Thank you, your honor.

14 THE COURT: Anything else before we bring the
15 jury in?

16 MR. STURDIVANT: Nothing from the state.

17 THE COURT: Anything from the defense?

18 MR. GOLDSMITH: Nothing from the defense,
19 your honor.

20 THE COURT: All right, there is a
21 cameraperson standing right in front of the door where
22 the jury will be coming in, so you will need to move.

23 Madam Clerk, please get the jury.

24 THE CLERK: Yes, your honor.

25 (Brief Pause in Proceedings)

1 THE CLERK: All rise for the jury.

2 (The jury enters the courtroom)

3 THE COURT: Good morning everyone. Please be
4 seated.

5 Good morning, ladies and gentlemen. Welcome to
6 Day three.

7 The defense may call its next witness.

8 MS. CHUANG: Thank you, your honor; the
9 defense calls Mr. Erik De Place.

10 (Brief Pause in Proceedings)

11 THE COURT: Good morning, sir.

12 MR. DE PLACE: Good morning.

13 THE COURT: Please raise your right hand for
14 me.

15 ERIK DE PLACE IS SWORN

16 THE COURT: Thank you. Please have a seat.
17 Please state your name and spell your last name.

18 MR. DE PLACE: My name is Erik De Place. It
19 is spelled D-E, space, capital P-L-A-C-E.

20 THE COURT: Mr. De Place, there are
21 microphones in front of you. None of those are
22 amplifying your voice in any way. They are just simply
23 recording you, so keep your voice up so everyone can
24 hear you.

25 MR. DE PLACE: Yes, sir.

1 THE COURT: Ms. Chuang, please proceed.

2 MS. CHUANG: Thank you.

3 * * * * *

4 D I R E C T E X A M I N A T I O N

5 BY MS. CHUANG:

6 Q. Good morning.

7 A. Good morning.

8 Q. I am going to ask you some questions about your
9 qualifications.

10 What is your occupation?

11 A. I am policy director at Sightline Institute, a research
12 center based in Seattle.

13 Q. Okay, and what does Sightline do exactly?

14 A. We look at a range of questions related to
15 environmental and economic issues in the Pacific
16 Northwest.

17 We work in Oregon, Washington and British
18 Columbia.

19 There are a whole range of issues that we work on.

20 My particular focus is on energy policy, in
21 particular transport of energy products.

22 Q. Great, and what is your official title?

23 A. My official title is policy director.

24 Q. And how long have you been doing this?

25 A. I have been at Sightline Institute for 14 years. I

1 have been policy director for the last five years.

2 Q. Okay, and what did you -- what was your other function
3 at Sightline before you became policy director?

4 A. I have worked on a range of questions related to energy
5 and carbon emissions, related to climate change,
6 transportation economics -- many, many fields that
7 connect to this.

8 Q. Okay, great.

9 What is your educational background?

10 A. I have a bachelor's degree from Seattle Pacific
11 University. I graduated in 1996.

12 I have a master's degree from the University of
13 Notre Dame where I graduated in 1999.

14 Q. Right, and what types of courses did you have to take
15 to receive these?

16 A. I was actually a political science major as an
17 undergraduate. I was a philosophy -- I was working on
18 a PhD in philosophy at Notre Dame.

19 Q. Okay, and have you attended or conducted any seminars
20 related to this -- your field or your work?

21 A. Yes, I both attend and present at conferences related
22 to energy economics and energy transport, so I am known
23 in the field and a student of the field and have been
24 for many years now.

25 Q. Okay.

1 And how often would you say you attend or speak at
2 these conferences?

3 A. Several times a year, at minimum.

4 Q. Okay, and can you name for us some of the events you
5 have spoken at?

6 A. Sure, I've spoken at the Pacific Northwest Regional
7 Conference of Economists.

8 I have spoken at, several times at what is
9 referred to as the "Institute for Energy Economics and
10 Finance," which is based in New York, and several
11 others of that ilk.

12 Q. Okay. Great.

13 And before working for Sightline, where did you
14 work?

15 A. I worked for the Northwest Area Foundation, a private
16 foundation based in St. Paul, Minnesota, working on
17 economic development in low-income rural areas.

18 Q. Okay, and do you have -- are you a member of any
19 professional associations or --

20 A. I'm not.

21 Q. Okay.

22 When did you start researching the transportation
23 of fossil fuels?

24 A. We began a careful examination of this particular type
25 of fossil fuel transport in around 2010 and 2011 when

1 the coal export schemes first emerged on the scene in
2 the Pacific Northwest.

3 Q. Okay, and have you published any articles on this
4 topic?

5 A. I have published an estimated 300 articles on the
6 topics of coal export, coal transport and oil
7 transport.

8 Q. Can you just name some of these article titles or
9 anything?

10 A. Sure.

11 The sort of flagship publications that I have
12 produced include a report called "Northwest Coal
13 Exports"; another one called "Northwest Fossil Fuel
14 Exports"; a third called "The Northwest Pipeline on
15 Rails," which refers to oil trains in particular, and
16 then specific targeted looks at some corporations who
17 are major players in the industry.

18 Q. Okay, and this topic I am assuming also relates to
19 climate change as well?

20 A. It does.

21 One of the things that is most interesting about
22 this topic right now is it represents a dramatic change
23 from the way that energy has been used and transported,
24 particularly in this region, to what is likely to come
25 down the pike in the future.

1 Q. Okay, and have you focused your research on the Pacific
2 Northwest, specifically?

3 A. My research focuses on the Pacific Northwest, but of
4 course the energy economy is continent wide, and so it
5 is often very germane to understand the dimensions of
6 the -- of the regional -- of the sort of continent wide
7 energy economy.

8 Q. Okay. Great.

9 Have you ever testified before?

10 A. I have testified with the Skagit County Hearing
11 Examiner before in a case related to oil trains, and I
12 have testified any number of times in front of
13 legislative bodies, including the King County Council,
14 the Seattle City Council, and probably at least a half-
15 dozen times in front of the state legislature -- maybe
16 a dozen times in front of the state legislature.

17 Q. Have you ever been on the radio?

18 A. I have been on the radio more times than I can count,
19 yes.

20 Q. Okay.

21 And what materials did you review to prepare for
22 this case?

23 A. In preparation for today's conversation, I reviewed
24 many of the publications, including those most relevant
25 to oil by rail transport.

1 Q. Okay, and are these materials that you routinely rely
2 upon in your field of expertise?

3 A. They are indeed.

4 Q. Okay. Thank you.

5 Okay, so we are just going to start pretty simply;
6 what are fossil fuels?

7 A. Right.

8 "Fossil fuels" is a term that is common in my
9 profession, but is perhaps unfamiliar to those outside
10 of it.

11 Fossil fuels refer to those sources of energy that
12 were originally deposited as biological material,
13 usually plant material, and then over time they have
14 compressed into energy dense forms that we now refer to
15 as coal, oil or natural gas, and some derivatives of
16 those.

17 Q. Okay.

18 A. Those are the principal ones.

19 Q. And what do we use them for?

20 A. Fossil fuels are used mostly to produce energy.

21 We dig them up, process and refine them in some
22 way, and then generally burn them.

23 We burn coal to produce electricity and also
24 produce industrial products like steel.

25 Oil is of course then blended into a range of

1 consumer products like gasoline and diesel, jet fuel
2 and so forth.

3 Natural gas is used for both electricity
4 production as well is the manufacture of petrochemical
5 products.

6 Q. Okay, and how are they normally transported?

7 A. Well coal, because it is a heavy bulk commodity, is
8 typically transported by rail or -- although not so
9 much in this region, but it has been transported by
10 rail for decades if not a century in this country -- or
11 by truck.

12 Oil typically is transported by pipeline or by
13 tanker vessel.

14 That has been changing since 2012 when we first
15 saw an outsize growth in the movements of oil trains.

16 Q. Okay.

17 And what do these trains look like?

18 A. So the trains -- many folks in this region have
19 probably seen them already.

20 A coal train is typically composed of 100 to 110
21 hopper cars full of coal.

22 Each of those cars contains about 100 to 110 tons
23 of coal, so in aggregate you're looking at, you know,
24 10- to 12,000 tons of coal per train.

25 In an oil train you would again see roughly

1 five -- or sorry, 110 tank cars. They are usually
2 black, they are usually uniform in appearance, each of
3 those carrying about 700 barrels of oil, so if you do
4 the math, for 100 tank cars you would have about 70,000
5 barrels of oil, which is something like -- yeah, 70,000
6 barrels of oil per train passing by.

7 Q. So these are big?

8 A. They are quite large. They are more than a mile long,
9 sometimes up to a mile and a quarter. They are very
10 large.

11 Q. Okay.

12 And can you tell us a bit about the impacts of
13 trains carrying this type of material?

14 A. Yes.

15 So we see a range of impacts from the rail
16 transport of fossil fuels.

17 The most immediate impacts are those that are felt
18 by ordinary drivers on the roads because the trains are
19 so long and because they have to move at relatively
20 modest speeds, particularly in urban areas they
21 obstruct traffic quite frequently, so we have seen lots
22 of folks who are concerned about getting to the
23 stadiums, for example, on time, and find their way
24 blocked by a coal or oil train.

25 That is probably the most benign form of

1 impediment that they have for our lives.

2 Coal trains are known sources of coal dust. Coal
3 dust is well known to be a fairly serious public health
4 concern.

5 In addition to that, oil trains bring with them a
6 range of very serious implications, including the risk
7 of oil spills, which happens frequently on oil
8 railcars.

9 We have also seen them derail and explode
10 catastrophically 10 times in the last 2 1/2 years, and
11 when I say "catastrophically," I am referring to very
12 cinematic looking, 300-foot tall fireballs of
13 explosion, in one case killing 47 people in a small
14 town in Québec, so there is a very immediate public
15 health risk from a derailment and fire.

16 And then last but not least would be the larger
17 environmental concerns of moving new coal and oil
18 products to market and burning them, because the
19 burning of all fossil fuels -- this is one of the major
20 characteristics of coal, oil and natural gas is that
21 burning them releases carbon, carbon dioxide, and the
22 carbon dioxide warms the planet, and when we look at
23 new projects, it is not -- not what has happened in the
24 Northwest historically, but what the new projects that
25 have come online since 2012, or been proposed since

1 2012, if we add up the new coal, oil and natural gas
2 projects, there is a proposed 822 million metric tons
3 of carbon emissions, which probably doesn't mean
4 anything to a lay audience, but that is roughly 8 or 8
5 1/2 times as much carbon dioxide as is produced by
6 every activity in the state of Washington on an annual
7 basis.

8 It is roughly 5 or 5 1/2 times as much carbon as
9 would be transported through the Keystone XL pipeline,
10 would have been transported through the Keystone XL
11 pipeline, which of course many folks held up as an
12 environmental litmus test for President Obama.

13 So what we are talking about for this sort of last
14 category of impacts from fossil fuel transport are
15 very, very serious carbon implications that have very,
16 very serious implications for the global climate.

17 Q. How immediate are these risks?

18 A. Well they are very immediate. Right now -- and I guess
19 it is worth spending just about 30 seconds on
20 historical context -- the Pacific Northwest has for as
21 long as it has been really a region in this country,
22 has been known as a relatively clean part of the -- of
23 the national energy picture.

24 Most of our power comes from hydropower. We have
25 been -- sort of prided ourselves on environmental

1 leadership and on leadership in clean energy.

2 Over the last few years, we have seen a dramatic
3 change in North American, and in fact global energy
4 markets, and in very simple terms what has happened is
5 that the region has become a victim of its geography.

6 It is pinched between large reserves of coal, oil
7 and natural gas in the interior of the continent, huge
8 deposits, some of the biggest deposits on earth, and
9 the fastest growing energy markets, which are in Asia.

10 And because of the economics of transporting these
11 products to market, it means that the Pacific Northwest
12 is finding itself confronted with dozens, literally
13 dozens of proposals to build new gas pipelines and
14 liquefaction sites for natural gas, 15 oil by rail
15 proposals, as many as 10 coal export terminals, a whole
16 range of petrochemical proposals that I won't talk
17 about today, and so as a consequence the Pacific
18 Northwest has moved from an area that is largely
19 irrelevant to the American energy economy to one that
20 is probably one of the -- one of the most interesting
21 places in the world because there is such intense
22 pressure from coal and oil and gas companies to move
23 their product through this region.

24 Q. So it sounds like it is also happening now?

25 A. It is happening right now to a very small degree. We

1 have begun to see about 10 to 15 percent of the total
2 amount of projects that are being proposed.

3 And when I say a project is being proposed, I
4 don't mean a napkin sketch, I mean an actual project
5 with a submitted permit application, with an advanced
6 PR team and with, oftentimes with hundreds of millions
7 of dollars of capital behind it.

8 So I am talking about very specific projects that
9 would move absolutely staggering quantities of coal and
10 oil through this region.

11 Q. And can you name some of those projects in the Everett
12 region or that area near the Delta yard?

13 A. Yeah, the -- one of the -- the biggest coal export
14 terminal anywhere in North America is being proposed
15 for a site at Cherry Point, which is just north of
16 Bellingham. It is referred as the "Gateway Pacific
17 Project."

18 It would move, on an annual basis, 488 -- sorry,
19 48 million metric tons of coal per year, which as I
20 said would be the biggest coal export terminal anywhere
21 in North America, one of the biggest in the world, in
22 fact.

23 In addition to that, we have proposals to move
24 large quantities of oil trains to sites north of
25 Everett at the Puget Sound refineries. Some of those

1 are already operating. Many of them are capable of
2 expanding.

3 And then there are a whole range of proposals at
4 Grays Harbor, the Hoquiam/Aberdeen region and then a
5 very large number on the lower Columbia River.

6 Q. Okay, and so just to break down the numbers again --

7 A. Yes?

8 Q. I apologize. I'm not an expert in this field.

9 What does this mean for communities in this area?

10 A. What it means is a huge increase in the transport of
11 oil and coal traffic, so if you go back to let's say
12 2010, you would not have been able to find what we
13 refer to as a unit train of crude oil.

14 You might have been able to find an isolated tank
15 car here or there carrying crude oil, because it is --
16 moves around and has been moved around historically in
17 relatively small volumes. Not until 2012 did we begin
18 to see the arrival of these 100-car, mile-plus long oil
19 trains.

20 Since that time we have seen them increase to
21 about four per day.

22 If all of the projects are permitted and operated
23 at full capacity, we would see up to 14 oil trains per
24 day traveling through Washington State. That is loaded
25 oil trains, plus any empties returning, which of course

1 also obstruct traffic and also leak.

2 On top of that, we are scheduled to see something
3 on the order of 35 to 40 oil -- or coal trains -- that
4 is including loaded and empties -- on a daily basis
5 through this region.

6 So as a -- I don't want to go on too long, but as
7 a point of context, Washington State has five oil
8 refineries. Four of them are fairly large; one is
9 small.

10 So we are considered a refining center in this
11 region. We refine oil; we consume it here locally.

12 We can refine about 630-, 640,000 barrels per day.
13 That is our refining capacity in the Pacific Northwest,
14 in Washington State.

15 We are scheduled to see 1 million barrels of oil
16 delivered only by rail through Washington State. So
17 that is to say if we got rid of every pipeline, every
18 tanker vessel, and only took the oil trains scheduled
19 for delivery here, we couldn't come close to refining
20 that amount of oil, which strongly suggests that the
21 oil is not intended for us, it is intended for markets
22 abroad, probably in Asia, perhaps in California,
23 arguably Hawaii or other places, so we stand to see a
24 dramatic increase in the amount of crude oil that is
25 moved through this region and the vast majority of that

1 movement would come by train.

2 Q. Okay.

3 Just to backtrack a little bit, can you give us
4 any examples of derailments or explosions in the
5 Pacific Northwest?

6 A. Yes.

7 So it is widely believed in the industry that rail
8 is the most dangerous way of transporting crude oil,
9 short of a truck.

10 Trucks are probably slightly more dangerous, but
11 they are much more dangerous than pipelines, much more
12 dangerous than tanker vessels.

13 In the Pacific Northwest, we have been fortunate
14 so far that the derailments we have seen and the spills
15 we have seen have not resulted in the sort of
16 catastrophic explosions that we have seen in other
17 regions of the country.

18 We have, however, seen at least one crude oil
19 train derail. It happened under the Magnolia Bridge in
20 Seattle in the summer of 2014.

21 Q. So fairly recently?

22 A. Fairly recent.

23 Q. And in your opinion, it was just lucky that it wasn't
24 worse?

25 A. We were very lucky.

1 What happened is in the early morning hours, it
2 was around 1 AM, I believe, an oil train that was
3 moving between the south rail yard and the north rail
4 yard in Seattle derailed and the tanker cars fell over
5 on their side.

6 The construction of those tank cars becomes quite
7 an interesting matter that we won't get into today, but
8 they are very prone to leaking. They have outlet
9 valves on the bottom that often crack, even under
10 ordinary circumstances, and release some of the fluid
11 oil inside of it.

12 That oil, if it is contacted by spark, can easily
13 combust.

14 In this particular case, the oil train flopped
15 over on its side, about three of the railcars did and
16 nothing happened.

17 So we dodged a bullet in a very serious way at
18 that point.

19 Q. Okay, and was this a Burlington Northern Santa Fe
20 train?

21 A. It was.

22 BNSF is the dominant hauler of crude oil
23 nationally.

24 BNSF is also the dominant railroad in Washington,
25 in Western Washington, and this did happen on BNSF

1 track.

2 Q. Okay.

3 A. I would add that BNSF has on its track, on its -- what
4 we refer to as "class 1," that is the best quality of
5 track, has had two derailments that resulted in
6 catastrophic explosions, one in eastern North Dakota in
7 late 2013 and one in western North Dakota in early
8 2015.

9 Q. Were there any casualties?

10 A. In neither case was there a casualty. They happened in
11 remote rural areas.

12 One of them was actually recorded by drivers with
13 their cell phone cameras, and so you can hear sort of
14 "Fargo" accented voices describing the eruption of a
15 tower and fireball just yards from a town.

16 Q. And what -- if this had happened in a community or a
17 town like -- such as Everett -- what could be the
18 consequences?

19 MR. STURDIVANT: Your honor, calls for
20 speculation.

21 THE COURT: Ms. Chuang?

22 MS. CHUANG: It is opinion testimony from an
23 expert.

24 THE COURT: It does call for speculation. It
25 is not an opinion.

1 The objection is sustained.

2 MS. CHUANG: All right.

3 Q. (By Ms. Chuang) Can you describe how BNSF responded to
4 this accident?

5 A. Yes, BNSF's response was, in my opinion, quite poor.

6 The derailment happened at -- we believe at 1:05
7 AM. We believe that they had their own crew on the
8 scene within about five minutes of the derailment
9 occurring -- because it was quite near their existing
10 rail yard.

11 They did not contact the relevant authorities for
12 almost 2 hours.

13 When they did contact the relevant authorities,
14 that is the Department of Ecology, they notified the
15 Department of Ecology that there was no hazardous
16 material involved in the accident, which flies in the
17 face of both the law and common sense.

18 In fact they did not inform the Seattle Fire
19 Department, nor did they inform any of the local
20 emergency response authorities.

21 In fact those folks who were notified of -- when
22 an area business owner arrived to work, saw the
23 derailed oil train and realized that something was
24 amiss -- and in fact the city of Seattle's emergency
25 response chief heard about it in a radio broadcast that

1 woke her up on her alarm.

2 So the railroad was extremely remiss in reporting
3 this, and in fact never did actually report the
4 presence of hazardous substance on that train until the
5 receiving oil refinery, a refinery based in Anacortes,
6 actually notified the Department of Ecology that it was
7 their train that was headed their direction, and was in
8 fact loaded with crude oil, and was in fact a
9 combustion risk.

10 Q. Okay, and so your opinion, too, is that BNSF handled
11 these risks poorly?

12 A. BNSF handles these risks extremely poorly. It is part
13 of a pattern of behavior that we have seen from them.

14 We have in fact documented their emergency
15 response handling to other derailed hazardous substance
16 trains.

17 There was a train, for example, near Chambers Bay
18 in Tacoma that derailed carrying sodium hydroxide.

19 When that train derailed, we saw a similar pattern
20 of obfuscation and failure to correlate or inform the
21 relevant emergency responders.

22 And it is a contention of mine that is borne out
23 by physical evidence from federal and state regulators,
24 and if I may, I would point out that since 2006, in
25 North Dakota, the Federal Railroad Administration, that

1 is the federal agency that is tasked with overseeing
2 the safety of the railroad infrastructure, cited BNSF
3 for 721 violations.

4 BNSF's response to that contention was that it --
5 it wasn't as bad as it sounded because it was less than
6 one track defect per mile.

7 In Washington State our state agency called the
8 "Utilities and Transportation Commission," which is the
9 regulatory body that oversees railroads, among other --
10 of other features of our infrastructure, they analyzed
11 one four-month period from November 2014 to February
12 2015.

13 During that period they found that the railroad
14 had failed to report 14 oil spills by train, or 14
15 spills of hazardous materials by train, including crude
16 oil, for a total of 700 violations.

17 BNSF's response to that UTC finding was that there
18 were actually only 235 violations during that four-
19 month period, not 700.

20 Q. Wow. Okay.

21 And so how accurate are these numbers? Where are
22 you getting these numbers from?

23 A. The numbers that I have cited for the state regulatory
24 body comes directly from the state regulatory body.

25 Q. Okay.

1 A. The numbers I cited for the federal inspections in
2 North Dakota come directly from the Federal Railroad
3 Administration.

4 Q. Okay.

5 And in terms of going back to the expansion of
6 transporting oil in this way, where are you getting
7 those numbers from?

8 A. All of those numbers come directly from the industry
9 themselves, so what I have done in my assessment, my
10 inventory of these projects is to look at the actual
11 submitted permit applications for oil by rail projects,
12 so these are the numbers provided by the industry
13 themselves.

14 All I have done is gather that information and add
15 them up.

16 Q. Okay.

17 And in your opinion, how effective are traditional
18 means in raising awareness about this issue?

19 A. Well, not very effective, unfortunately.

20 We have seen not only 47 people die in the oil
21 train fire in Québec when the first catastrophic
22 derailment happened, but then subsequently nine
23 derailments with catastrophic explosions.

24 You know there's probably no other industry in
25 America that can operate this way. If we have a

1 battery pack fire on a plane, the FAA grounds those
2 planes until the problem is fixed.

3 If we have an airbag deployment problem, the
4 federal government will recall those -- force a recall
5 of those cars until the problem is fixed.

6 In the confluence of the oil industry and the rail
7 industry, which is what we see with oil trains, we can
8 have derailment and explosion after derailment and
9 explosion, almost like clockwork, go on for more than
10 two years, and the federal government's response is
11 largely to meet with the industry proponents and talk
12 about a very delayed phase-out period whereby a
13 fraction of the most dangerous railcars would
14 eventually be removed from service over some period of
15 years.

16 So the response from government agencies has been
17 woefully lacking.

18 We have been fortunate to get some media
19 attention. That happens when you blow up trains in the
20 middle of populated areas, but as a general matter to
21 respond directly to your question, most of the attempts
22 to draw attention and awareness to this issue have not
23 been adequate to task.

24 Q. Thank you.

25 MS. CHUANG: I have no further questions.

1 THE COURT: Mr. Joyce, any questions for this
2 witness?

3 MR. JOYCE: No further questions, your honor.

4 THE COURT: Ms. McCallum?

5 MS. MCCALLUM: No, your honor.

6 THE COURT: Mr. Goldsmith?

7 MR. GOLDSMITH: None.

8 THE COURT: Mr. Mazza?

9 MR. MAZZA. None.

10 THE COURT: Cross-examination?

11 MR. STURDIVANT: I just have one question.

12 * * * * *

13 C R O S S - E X A M I N A T I O N

14 BY MR. STURDIVANT:

15 Q. You said you keep statistics and scientific evidence,
16 correct?

17 A. Yes.

18 Q. Do you have any scientific or statistical evidence that
19 illegal protests are more effective in getting the word
20 out than legal protests?

21 A. No, sir.

22 MR. STURDIVANT: Nothing further, your honor.

23 THE COURT: Any redirect, Ms. Chuang?

24 MS. CHUANG: Thank you, your honor.

25 * * * * *

1 R E D I R E C T E X A M I N A T I O N

2 BY MS. CHUANG:

3 Q. In your opinion, more awareness is better, correct?

4 A. Yes, that's correct.

5 Q. Okay.

6 THE COURT: Any other redirect from any of
7 the defense counsel?

8 (All answer no)

9 THE COURT: Any recross?

10 MR. STURDIVANT: No, your honor.

11 THE COURT: Thank you, sir. You can step
12 down.

13 MR. DE PLACE: Thank you.

14 THE COURT: Defense may call its next
15 witness.

16 MS. McCALLUM: The defense calls Dr. James
17 Gammon.

18 (Brief Pause in Proceedings)

19 THE COURT: Good morning, sir.

20 DR. GAMMON: Good morning.

21 THE COURT: Please approach me and shift your
22 documents to your other hand.

23 Raise your right hand for me.

24 DR. RICHARD GAMMON IS SWORN

25 THE COURT: Thank you. Please have a seat,

1 sir.

2 Please state your name and spell your last name.

3 DR. GAMMON: My name is Richard Harris
4 Gammon, G-A-M-M-O-N.

5 THE COURT: Mr. Gammon, there are some
6 microphones in front of you.

7 I just tell every witness this: They are not
8 broadcasting your voice in any way; they are only
9 recording you.

10 DR. GAMMON: Um-hum.

11 THE COURT: You don't need to lean into them.

12 DR. GAMMON: Okay.

13 THE COURT: I just don't want you to think
14 that everyone can hear you, and keep your voice up --
15 so please keep your voice up.

16 Ms. McCallum, please proceed.

17 * * * * *

18 D I R E C T E X A M I N A T I O N

19 BY MS. McCALLUM:

20 Q. Good morning, Dr. Gammon. Thank you for being here.

21 Can you tell us what your occupation is?

22 A. At this moment I am a retired professor from the
23 University of Washington.

24 My appointment was in chemistry and oceanography
25 and adjunct in atmospheric sciences.

1 Q. And what is your educational background?

2 A. I have a PhD in physical chemistry from Harvard in
3 1970, and then I was a scientist studying the origin of
4 life in space, looking at interstellar molecules.

5 When I came back from Brazil, I realized that I
6 wanted to really work on science that affected people,
7 so I transitioned from astrochemistry into
8 environmental science.

9 After a short time as the director of science at
10 the Pacific Science Center, where I worked in public
11 understanding of science, and I continue my interest in
12 public understanding of science through public lectures
13 that I give in retirement --

14 Q. And can you describe some of your professional
15 activities?

16 A. Right.

17 I think most relevant today would be that -- I
18 worked coming back from Brazil on stratospheric ozone
19 depletion, looking at the chlorofluorocarbons and using
20 radio telescopes as I had done for interstellar space,
21 and when I followed these Freon gases into the ocean
22 and began to study the Freons as tracers of ocean
23 circulation, which is useful to calibrate models of the
24 role of the ocean in global climate change --

25 This is really how I made a transition from

1 laboratory chemistry to space to the stratosphere to
2 the oceans. This is why I have an appointment between
3 chemistry and oceanography.

4 In the early 1980s, I was the director of the
5 carbon dioxide measurement program for the US
6 government, so I really had my finger on the pulse of
7 the planet from Barrow, Alaska, to the South Pole,
8 especially the Mauna Loa record.

9 I went to the Mauna Loa Observatory with Dave
10 Keeling at that time to convince them that not just
11 Dave Keeling, but the US government could also measure
12 CO2 accurately at Mauna Loa.

13 And that's really when I became radicalized
14 looking at how CO2 was increasing in the atmosphere.

15 I was invited to be a co-author on the carbon
16 cycle chapter of the first intergovernmental panel on
17 climate change assessment in 1990.

18 So I have really been involved in climate science
19 and interpreting climate science and explaining climate
20 science to the public for many, many decades, most of
21 my career.

22 Q. And do you have any publications?

23 A. I have an extensive set of peer-reviewed publications.
24 As I said, some of them would have been in fundamental
25 laboratory chemistry; some of them would have been in

1 astronomy or astrochemistry; most of them would be in
2 stratospheric chemistry and the role of the ocean.

3 The one that I am most proud of probably was a
4 cover feature in Nature where satellites could look at
5 trees and see the greening, seasonal greening of the
6 forests, and we correlated that with the measurements
7 that I was responsible for of CO2 uptake and release by
8 Mauna Loa, Barrow, South Pole.

9 So this was the first paper that sort of directly
10 connected measurements on the ground of changed
11 seasonal -- CO2 changes with satellite measurements of
12 seasonal greening.

13 Q. And did you -- have you ever testified before?

14 A. Not in this setting.

15 I have given testimony for the state -- it is
16 called SFEC, the Site Facility Evaluation Council with
17 the siting of fossil fuel plants -- the Sumas plant.
18 That was about 10 or 15 years ago.

19 Not in a trial like this, though.

20 Q. And did you review any materials in preparation for
21 your testimony today?

22 A. Yes, I did.

23 I have sort of a standard talk that I give to
24 school groups, church groups, business groups, but I
25 reviewed again carefully the summary for policymakers

1 of the latest report from the intergovernmental panel
2 on climate change 2013/2014, which is the international
3 consensus on climate change and fairly scientifically
4 conservative, actually.

5 And then of course that science stopped about
6 2012, so there's three or four years of science since
7 then, so the more recent literature, which is not in --
8 in the intergovernmental panel report yet.

9 Locally the climate impacts group at the
10 University of Washington issues regular reports on the
11 impact of climate change in the Pacific Northwest, and
12 on the state of Washington, sector by sector, and they
13 have two reports, one on Puget Sound and one on impacts
14 for the state.

15 They're not funded to look at mitigation, they are
16 funded to look only at adaptation but those reports are
17 also in my review in preparation for this day.

18 Q. And are these materials typical materials that would be
19 relied upon by professionals in your field?

20 A. Absolutely.

21 MS. McCALLUM: Your honor, may I ask leave to
22 reposition myself?

23 THE COURT: Sure.

24 (Brief Pause in Proceedings)

25 Q. (By Ms. McCallum) So Dr. Gammon, let's start on a

1 global level.

2 Can you describe for the jury how fossil fuel
3 emissions are affecting our climate?

4 A. Well it has been known actually for 250 years that
5 carbon dioxide traps heat. It was shown by a British
6 scientist in a public lecture in 1850.

7 Since 1900 -- Arrhenius was the first one to
8 actually calculate how much the world would warm if we
9 doubled the CO2 in the atmosphere, and he was in
10 Sweden. He thought it would be a great thing.

11 But he was actually -- his calculation gave five
12 degrees centigrade, which is within the range of the
13 best models today for the global warming from double
14 CO2.

15 This is a very, very old problem.

16 President Lyndon Johnson warned the U.S. Congress
17 50 years ago, 1965, of the dangers of climate change,
18 so this is not a new problem at all.

19 Dave Keeling started the measurements at Mauna
20 Loa, Hawaii, in 1958, and this first intergovernmental
21 panel on climate change report is 1990, and there have
22 been reports every five years since then.

23 So CO2 is a greenhouse gas. We know that if we
24 put it in the atmosphere, that it mixes globally within
25 a year or a year and a half, and it traps heat. And

1 part of that heat is captured by the ocean, which warms
2 the ocean, which evaporates more CO₂, which doubles the
3 effect of warming, and so we can say that doubled CO₂
4 in the global atmosphere, in equilibrium, will have a
5 warming somewhere around 2 to 4 degrees centigrade,
6 double that for Fahrenheit -- 4 to 8 degrees
7 Fahrenheit, as a global average.

8 Since we live in the northern hemisphere on the
9 land, you can -- you can double that again by a factor
10 of two.

11 The warming is greater in the northern hemisphere
12 than the southern hemisphere. Greater on the land than
13 over the ocean. Greater in the Arctic than near the
14 equator. Greater in the winter than the summer.
15 Greater at night than during the day.

16 All of these things are observed.

17 Q. And I know it is difficult to explain to a layperson,
18 such as myself, what that effect is on our planet, but
19 can you give us an idea of what effect that has on our
20 ecosystems?

21 A. Well we -- as a species, we evolved during the last Ice
22 Age or so, maybe 200,000 years ago, you know, Homo
23 sapiens.

24 We walked out of Africa about 70,000 years ago.

25 We survived the peak of the last Ice Age about

1 25,000 years ago.

2 And for the period of the last 10,000 years, the
3 Holocene, we came to cities, we established writing and
4 civilization, all of this in a very stable climate, and
5 the atmosphere today is something that no living human
6 has ever breathed back to the origin of our species.

7 No person alive, any human ever has breathed an
8 atmosphere, a clear atmosphere of 400 parts per
9 million, and that's where we are today.

10 What was the climate back then? That was in the
11 Pliocene, 3 or 4 million years ago.

12 Well it was three or four degrees warmer. The sea
13 level was 30 or 50 feet higher. The position of the
14 forests and the grasslands and the deserts was entirely
15 different.

16 So we have already changed the atmosphere in such
17 a way that the climate coming to us is going to be
18 something that there is nothing in our history, nothing
19 in our living memory, and nothing in our genes that
20 would prepare us for this.

21 Q. So are you saying that our climate, as it currently
22 stands, is unstable?

23 A. Yes.

24 Our climate will continue to change as long as CO2
25 changes.

1 If you want to stabilize the climate, you have to
2 stabilize atmospheric CO2, which means stop emitting
3 CO2.

4 Q. And when you say stop emitting CO2, you are talking the
5 level that we are currently -- current admissions?

6 What will it take in scientific expert opinion to
7 stabilize our planet?

8 A. Well the Paris COP21 agreement is very optimist. I
9 think it is an aspirational target. It says we must
10 stop the warming well -- quote, "well below two degrees
11 C and aim at 1.5."

12 Personally I think we see 1.5 in the rearview
13 mirror already. I think we would be very lucky to stop
14 at two.

15 Most of the scenarios that have the world stopping
16 at two degrees global warming had global emissions
17 peaking in 2010, and in the latter half of this coming
18 century, negative emissions -- sucking the CO2 back out
19 somehow. We don't know how.

20 But these are not very realistic plans at the
21 present time, so we have an enormous task ahead of us.

22 Now they say net zero emissions, so yes, if we can
23 make the tropical forests more effective, find some way
24 to suck CO2 out of the open air, and bring it back
25 down, then we could stop at two degrees -- with some

1 chance, 50-50 chance for our children and their
2 children, but this is an enormous task.

3 A one or two percent per year decline in the
4 European Union and the US will not do it.

5 And of course we can't ask India and China to stop
6 burning coal and oil because we do. They say, "You
7 guys got rich doing this, don't tell us not to do it.
8 Our children need a good life too."

9 Q. And you mentioned the Paris treaty?

10 A. Yes.

11 Q. Does that treaty have any teeth, so to speak?

12 A. It was carefully crafted so that it would not require
13 approval by the U.S. Senate.

14 The European Union and many other countries wanted
15 a much stronger binding treaty.

16 There are elements of the treaty which are
17 binding. The individual country commitments, which
18 were -- will be reviewed on a five-year basis do have
19 some teeth.

20 They are -- they have a shaming quality. You can
21 say, "You didn't meet your commitment," but there is no
22 legal penalty or financial penalty if a country says,
23 "Hey, we tried. We didn't do it."

24 So it is a little bit like -- I like this analogy:
25 The junior high school teacher gives you a writing

1 assignment to turn in the paper, but there is no
2 penalty to your grade. You never have to turn in the
3 paper. All you have to do is come to the assembly
4 every two weeks and show the other kids your homework.

5 That's a very simple view of Paris. I actually
6 think it is much stronger than that, but all of the
7 words in the treaty just said countries shall -- cross
8 out shall and put should -- and that way it avoided
9 becoming a treaty that required approval by the U.S.
10 Senate.

11 Q. And turning now to the local effects, can you describe
12 for us how much Washington State has already warmed?

13 A. Yes, it is pretty typical.

14 Again, I'm -- now I am quoting numbers from the
15 climate impacts group at the University of Washington,
16 which reports on a regular basis to the state of
17 Washington, the State Department of Ecology.

18 The warming over the last 50 years or so in this
19 state has been about -- about 1 1/2 degrees Fahrenheit,
20 which is pretty typical for other states in the United
21 States, but particularly northern tier states.

22 We have a moderating influence from the Pacific
23 Ocean and the winds that come off the ocean, so other
24 states would be warming more than that.

25 So the warming has been about .8 degrees

1 centigrade or 1 1/2 degrees Fahrenheit, pretty close to
2 the global average so far.

3 Q. And what are the projections for warming in the near
4 future?

5 A. It depends entirely upon the emissions scenario.

6 So in the latest IPCC report, there was a high
7 emissions scenario, which is double or triple CO2 by
8 the end of this century, and we are on that track,
9 actually, in terms of emissions -- we are on the high
10 emissions scenario, and there's a very optimistic one
11 which sort of takes us well below two degrees C,
12 somehow.

13 And so the warming in the SIG reports is a
14 fountain of the emissions scenario.

15 In a low emissions scenario, we might have a two
16 or three degrees Fahrenheit by the middle of this
17 century, and in a high emissions scenario we might have
18 six or seven degrees Fahrenheit as a state average by
19 the middle of this century, and these numbers continue
20 to go up as long as the CO2 increases.

21 Q. Now can you describe some specific ecosystems, for
22 example, our shellfish industry here in Washington
23 State?

24 A. Ocean acidification is called the evil twin of global
25 warming. It actually -- it is part of the same

1 problem.

2 CO2 is an acid gas. If we over pressurize the
3 atmosphere, the gas is pushed into the ocean. This is
4 happening globally, and we can now measure the change
5 in the acidity of the world's ocean. It is up 20, 30
6 percent. Why? Because the atmosphere has gone up 20
7 or 30 percent.

8 When we double CO2, the acidity of the ocean will
9 double, and right now we are already seeing the
10 impacts -- Taylor shellfish, for example -- that the
11 natural spawning of oysters off of our coast has
12 stopped, because in the first day or two, these larvae
13 have to make a little calcium carbonate shell, and the
14 waters are too acidic. It dissolves their shell. They
15 can't do it.

16 So the spawning of oysters now has to be
17 controlled by Taylor by adjusting the chemistry of the
18 water or doing it in Hawaii or something else.

19 So the impact on our shellfish is immediate and it
20 is quite apparent.

21 I think the other thing that worries me as a
22 salmon fisherman is that as we have less snow pack in
23 the summer, the water -- the snow pack is not stored in
24 the winter because the rain -- the precipitation is
25 coming as rain, not snow, and it means that the runoff

1 starts earlier and is less, and so by summer when
2 anadromous fish are trying to migrate, the stream flows
3 are very low, the waters are too warm.

4 We lost half of the sockeye in the Columbia last
5 year because the flows were too low and too warm.

6 Q. And you spoke of the snow pack?

7 A. Yes.

8 Q. How much snow pack have we lost in our mountains?

9 A. This is variable, of course. We have had decades of
10 warmer or cooler, or wetter or drier, but over the last
11 50 years, we probably lost 20 -- 20 or 30 percent,
12 averaging over decades, of the snow pack.

13 The predictions are by SIG that by the middle of
14 this century, for a high emissions scenario we may lose
15 40 or 50 percent of the snow pack -- by 2050 -- with
16 enormous implications for hydropower, for agriculture,
17 especially in the Yakima Basin.

18 Q. And what are the projections for changes in storminess,
19 flooding, drought and extreme weather in our region?

20 A. I like this question because people say, "Well is that
21 storm due to global warming?"

22 Wrong question. Wrong question.

23 "Is that drought due to global warming?"

24 Wrong question.

25 Think about it this way: The basic state of the

1 atmosphere is no longer the same. It is warmer.
2 Warmer means it holds more moisture. So the basic
3 state of the atmosphere, out of which all weather
4 arises, is different.

5 So you can say every single weather event has a
6 component of global warming.

7 We have loaded the dice. We have changed the
8 odds.

9 It is like which cigarette gave me lung cancer?

10 Which bottle of whiskey wrecked my liver?

11 Don't ask that. We know the statistics. If you
12 keep smoking, you keep drinking you are going to wreck
13 the climate.

14 We keep putting CO2 in the air we are going to
15 wreck the climate.

16 Q. And what is -- talk a little bit about sea level rise
17 and the effects of sea level rise in our area?

18 A. This is an area where I met with the SIG researchers
19 yesterday and they have some very -- too conservative
20 values, I think, for sea level rise, because in the
21 last two years very alarming reports have come in, in
22 the peer-reviewed literature, that major glaciers --
23 polar ice in Greenland and Antarctica has been
24 destabilized and is now unstoppable -- unstoppable.

25 Nothing anyone can do can keep these ice masses

1 from going into the sea, melting and raising sea level.

2 So instead of -- right now we have about an inch
3 every 10 years as a global average of sea level rise.
4 We may get 10 times that.

5 And so people like Jim Hansen and Stefan Rahmstorf
6 say, "No, not a meter, three feet."

7 "Not two meters."

8 NOAA says six feet by the end of this century. We
9 may get several meters by 2050. Bye-bye Miami.

10 So we are talking about a major sea level rise.

11 When I give talks in Anacortes, I tell people,
12 "Your grandchildren will not see the tulips in the
13 Skagit. There will be no tulips in the Skagit. That
14 will be all underwater in this century quite possibly."

15 Q. And what is the role of climate change in the current
16 record drought in the western United States, California
17 to Washington?

18 A. This is one area -- you know, this attribution issue of
19 saying a particular extreme event is due to climate
20 change, in the case of a long-term drought and a heat
21 wave over a large area, the models are getting pretty
22 good.

23 You run the model 1000 times with greenhouse
24 gases, 1000 times without them, and we look at the
25 differences, and you can begin to say with what odds a

1 particular drought/heat wave is due to climate change?

2 In the case of the California drought, we know
3 from tree ring data it is a once in 1000-year event.
4 In the California snow pack it is a once in 500-year
5 event.

6 When you start having once in 1000 year events
7 happening every 10 years, or every few years, and the
8 pattern looks exactly like what the models say is going
9 to happen later in the century, you begin to have some
10 confidence that these things are not, quote, "natural
11 events."

12 Q. So these effects are immediate? We are feeling them
13 right now?

14 A. Already.

15 Q. And would you say that our climate is in a state of
16 crisis?

17 A. For me, yes. I lose a lot of sleep over this. I am
18 called "Dr. Doom" in my talks, but you need to give
19 people some sense of hope that this is not inevitable.

20 Susan Solomon, in IPCC, said these changes --
21 there will be drought in the western United States --
22 is not inevitable, but it is irreversible. Once we do
23 it, we say, "Oh, okay, those guys were right. Let's do
24 something." Too late. For 1000 years nothing comes
25 back.

1 The ocean acidity is not restored in 10,000 years.

2 This is a little bit like nuclear war. Once we
3 have done it, there is no coming back. That's why we
4 have to stop it now.

5 Q. Can we stop it now in your opinion?

6 A. Yes, I think so. I think we can move very rapidly to
7 renewable resources, with or without nuclear.

8 The big debate about the role of nuclear -- I
9 personally say there's no silver bullet, there is
10 silver buckshot, and nuclear is one of the -- one of
11 the pellets, okay? We need them all, and the first one
12 is efficiency.

13 Solar and wind are coming on very strong.

14 Professor Jacobson at Stanford has a detailed
15 roadmap for every state in the US and every country of
16 how we can move to a totally renewable economy by 2050.

17 That's where we have to go. We have got to get 80
18 percent off of fossil fuels by 2050 or 2070. That's
19 the goal.

20 Q. And so you have worked on climate change for a long
21 time with experience dating back to the 1980s?

22 Would you say we are on that road right now?

23 A. Which road?

24 Q. The road to recovering our climate?

25 A. Not yet. Not yet.

1 Q. Why not?

2 A. First baby steps.

3 I think -- I think Paris is very good. Paris sort
4 of cancels out Copenhagen. We really have the roadmap
5 now.

6 Somebody said -- I think maybe Bill McKibben said
7 it is not -- it is not the game it is the scoreboard.
8 It is not the ceiling it is the floor.

9 And the secretary of energy said it is like the
10 car -- it is like the dog that chases the car. We just
11 caught the car. What are we going to do with the car?

12 We need to sort of get out of the car, the fossil
13 fuel developed car, and get in -- and electrify the
14 whole surface transportation in our country and in the
15 world.

16 Q. And based on current science and your experience
17 working in this area, would you say that our government
18 is adequately responding to the catastrophic effects of
19 climate change?

20 A. At the federal level?

21 Q. At the -- at all levels, but we will start with the
22 federal and we will --

23 A. I think Obama could have done more and he would do more
24 with a different Congress.

25 I think that the Clean Power Plan is a good start.

1 The fuel efficiency standards are a great start.

2 Half of the emissions in this state are from
3 transportation. In the rest of the US they have coal-
4 fired power, it's only a quarter, but for us
5 transportation is number 1, number 2 and number 3. And
6 electrifying our surface transportation will be really,
7 really important.

8 So no, the federal government hasn't done enough.
9 We have to do much, much more, and at the state level,
10 again, I think our governor has -- has the information.
11 He has the personal commitment to it, but he doesn't
12 have the legislature fully on board with him.

13 I think that there is much more that can be done
14 at all levels.

15 King County is probably doing a pretty good job.

16 I think there's a public information issue. I
17 think that as long as we have presidential candidates
18 denying the science of climate change -- I am ashamed
19 of that.

20 At Paris there were no deniers there. 195
21 countries, plus the EU, no political party, right or
22 left, of any of those countries denies the climate
23 science.

24 One country, one political party in one country;
25 sadly that's us.

1 Q. Now when you speak of a public information problem,
2 what do you think causes that lack of information
3 reaching the public?

4 A. Well back to the time when I was in charge of the US
5 CO2 measurement program for NOAA in Boulder in 1982 to
6 '84, Exxon had a very good research program. I knew
7 some of those guys who were measuring ocean acidity and
8 making predictions exactly like the predictions we have
9 now -- 2 to 4 degrees C warming for double CO2.

10 Exxon knew, and they knew very well, and then they
11 were a major funder of climate misinformation, so the
12 fossil fuel industry in the United States has a big
13 role to play in the extensive misinformation campaign
14 and in funding people who will stand up and politically
15 say there is no problem.

16 Upton Sinclair said it is very hard to convince a
17 man that something is true if his salary depends upon
18 it being false.

19 Q. So what can the average person do to raise awareness of
20 this issue?

21 A. I get this question always at the end of my talks,
22 which is always a pretty gloomy talk.

23 First of all, determine your own carbon emissions.

24 Go online, get a carbon counter, see what your
25 emissions are. You will probably find, if you fly a

1 lot, that is number 1. Driving is number 2. Your
2 house is important, too.

3 Seattle City Light has good programs for energy
4 efficiency. I have solar panels on my house and I
5 drive a Prius, but I fly a lot, so I am guilty in many
6 ways.

7 See what you can do to reduce your own carbon
8 emissions, and personally I buy carbon offsets to
9 offset my flying as well. I am taxing myself.

10 We need to impose a carbon tax. We need either a
11 cap and trade system like California has, or a carbon
12 tax like British Columbia has.

13 I hope that the two environmental efforts in this
14 state somehow join forces so that we have a clear
15 ballot initiative at the end of this year for the
16 voters of this state, because we need to put a price on
17 carbon. That's number 1.

18 Number 1 in the US, number 1 in our state and
19 number 1 globally -- a price on carbon.

20 Q. And would you agree that citizens speaking out about
21 this issue and providing information to their neighbors
22 is an important aspect of public information?

23 A. I have to. I have to. That's what I have been doing
24 since I retired, and yes, everyone has to do that,
25 whether it is in a coffee group of your neighbors --

1 I have not spoken as much to the chambers of
2 commerce, Rotary clubs, Lions clubs. I have done some
3 of that, but getting to the business community is going
4 to be really, really important.

5 Q. And were you involved in a case, Zoe & Stella Foster,
6 et al., v. Washington Department of Ecology?

7 A. Yes, I was, in a small way.

8 I met with Andrea Rogers, the --

9 Q. Could you first tell the jury what that case is?

10 A. Well, maybe you should tell them, because I don't
11 really know it very well.

12 It is a case where young people sued the state
13 Department of Ecology about their rules for addressing
14 climate change being insufficient.

15 Is that accurate?

16 Q. I can't --

17 A. That's enough?

18 Q. I can't comment on that, but --

19 A. Certainly.

20 THE COURT: Please don't ask the attorney --

21 DR. GAMMON: Oh --

22 (Laughter)

23 A. All right, and my role was really -- Andrea had
24 contacted Professor -- Dr. Jim Hansen saying, "This guy
25 Gammon out here, he is willing to write something about

1 this. Is he a good guy?"

2 Jim Hansen: "Yeah, get him. Get him."

3 So I wrote a statement about how I thought the two
4 degree limit was, quote, "Not safe," and that 1.5 had
5 never been agreed upon by the scientists as -- or the
6 two had never been accepted scientifically as, quote,
7 "safe," and the 1.5 was always in play, as it is now in
8 Paris. You see it in the document.

9 And that's basically what my statement said. I
10 didn't attend any of the hearings; I merely submitted a
11 statement about -- about the science at the
12 international level.

13 Q. Thank you, Dr. Gammon.

14 MS. McCALLUM: No further questions.

15 THE COURT: Any other direct examination from
16 any of the defense attorneys?

17 MR. JOYCE: No, your honor.

18 THE COURT: Ms. Chuang?

19 MS. CHUANG: No, your honor.

20 THE COURT: Mr. Mazza?

21 MR. MAZZA. No, your honor.

22 THE COURT: Mr. Goldsmith?

23 MR. GOLDSMITH: No, your honor.

24 THE COURT: Cross-examination, please?

25 * * * * *

1 C R O S S - E X A M I N A T I O N

2 BY MR. STURDIVANT:

3 Q. Good morning, Dr. Gammon.

4 A. Good morning.

5 Q. Just one quick question for you.

6 Do you have any scientific evidence that illegal
7 protests are more effective in limiting global warming
8 or helping climate change than doing legal protests or
9 meeting with groups like the Lions and groups like
10 that?

11 A. I have never been involved in a direct action like we
12 are here today to address, but I believe that it has an
13 extremely powerful effect upon the general public.

14 MR. STURDIVANT: Your honor, I am going to
15 object as nonresponsive.

16 DR. GAMMON: Oh, sorry. Let me try again.

17 THE COURT: I will -- well he seems to agree,
18 so I will sustain the objection.

19 Ask another question.

20 Q. (By Mr. Sturdivant) Do you have any scientific data
21 that illegal protests are more effective than legal
22 protests or other methods like you mentioned earlier?

23 A. I have no scientific data.

24 MR. STURDIVANT: Nothing further.

25 THE COURT: Thank you.

1 Any redirect, Ms. McCallum?

2 MS. McCALLUM: No, your honor.

3 THE COURT: Any other defense attorney or Mr.
4 Mazza?

5 MR. GOLDSMITH: No, your honor.

6 THE COURT: Thank you, sir. You may step
7 down.

8 And the defense may call its next witness.

9 MR. GOLDSMITH: The defense calls Abigail
10 Brockway to the stand.

11 THE COURT: Thank you.

12 Ms. Brockway, please come up.

13 Please raise your right hand for me.

14 ABIGAIL BROCKWAY IS SWORN

15 THE COURT: Thank you. Please have a seat,
16 ma'am.

17 Please state your name and spell your last name?

18 MS. BROCKWAY: Spell my last name?

19 THE COURT: Please.

20 MS. BROCKWAY: Abigail Castle Brockway, B-R-
21 O-C-K-W-A-Y.

22 THE COURT: Thank you.

23 Mr. Goldsmith?

24 MR. GOLDSMITH: Thank you, your honor.

25 THE COURT: Please proceed.

* * * * *

D I R E C T E X A M I N A T I O N

BY MR. GOLDSMITH:

Q. Good morning, Ms. Brockway.

A. Good morning.

Q. Do you mind if I call you Abby?

A. Please.

Q. Okay.

Abby, tell us something about yourself, your background to start with?

A. I was born in Bellevue, Washington, in February 1969.

My mother's name is Candy and she was a stay-at-home mom, and my father, his name is Truman, and he was a trial lawyer, and I have a younger brother that is four years younger than me named Grant, and I -- I went to college -- I mean --

Q. Where did you go to college?

A. Cornish College of the Arts on Capitol Hill.

Q. Okay.

Did you graduate?

A. Yes, I got a Bachelor of Fine Arts degree.

Q. Okay.

A. And while I was there I -- I cleaned offices. Actually I cleaned my dad's law office, and -- on the weekends -- and then I realized that I could clean

1 offices, so I started a little business cleaning
2 offices while I was in college.

3 Q. Okay?

4 A. And then I -- should I be looking over?

5 Q. Just answer the question. Don't worry about where you
6 look.

7 A. Okay.

8 Q. Did that lead to the work that you do now, the office
9 cleaning?

10 A. Can I just slow down a little bit or are we in a rush?

11 Q. I am trying to help you here.

12 A. Okay.

13 Q. Did your office cleaning lead to the work you are doing
14 now?

15 A. Hmmm --

16 Q. What do you do now, what kind of work?

17 A. I am a painting contractor.

18 Q. Okay.

19 A. And I -- I married my husband Roger and he is a
20 carpenter --

21 Q. Okay.

22 A. -- and so we merged our businesses.

23 I had a painting company and he had a carpentry
24 company and we started a small business, a painting and
25 carpentry business.

1 Q. Okay.

2 A. And --

3 Q. And do you still do that?

4 A. Yes.

5 Q. Okay, and you're married?

6 A. And so in 1999 I got married.

7 Q. Okay.

8 A. We --

9 Q. Go ahead.

10 A. Okay.

11 And what I also wanted to say was --

12 MR. STURDIVANT: Objection, your honor,
13 nonresponsive.

14 THE COURT: Sustained.

15 Ask a question.

16 Q. (By Mr. Goldsmith) Just answer my questions, okay?

17 A. Your question was "tell me about yourself," and you are
18 crowding me.

19 I am trying to have some space to tell about
20 myself.

21 THE COURT: Ms. Brockway?

22 A. May I do that?

23 THE COURT: Ms. Brockway?

24 I won't have you arguing, particularly with your
25 own lawyer.

1 Mr. Goldsmith will ask you a question; answer that
2 question, please.

3 Mr. Goldsmith, please proceed.

4 MR. GOLDSMITH: Thank you, your honor.

5 Q. (By Mr. Goldsmith) You also have a daughter?

6 A. Yes.

7 Q. What is her name and her age?

8 A. Her name is Sienna and she is 13 years old now.

9 Q. Okay.

10 Now how did you learn about the issues that
11 ultimately led to your action in this case?

12 A. I in -- after high school I couldn't wait to register
13 to vote, so I registered to vote, and that was 1987,
14 and then in 1988 there was a presidential election, and
15 so I went to the caucus and I -- because I -- so I went
16 to the caucus and I -- I was elected all the way
17 through to be a state delegate, as an undecided
18 delegate, and I think that people pushed me through as
19 I moved through the process because I was young and I
20 was interested in politics, and I think that the other
21 people wanted to see younger people getting involved,
22 and so they were --

23 Q. So what issues concerned you then, during this process,
24 leading up to the day of arrest?

25 What issues became important to you?

1 A. I collected signatures for initiative 103, which is a
2 community bill of rights, and while I was collecting
3 signatures, I decided to go to -- to a community
4 center, because I thought there would be a lot of
5 people to get signatures for.

6 And I -- that's where I met Robin from the Sierra
7 Club, and she was talking about coal trains in the
8 area.

9 Q. Okay, so that was your first exposure to coal trains?
10 Did you learn a lot about the subject then?

11 A. Yeah.

12 So I --

13 Q. What did you learn?

14 A. I learned that coal trains were coming through our
15 community. There were proposals that -- that the
16 Sierra Club was educating people for so they could
17 actually go to public hearings to submit comments, and
18 so I studied the issues and prepared myself to go.

19 Q. Did you learn about any of the harms from coal trains,
20 for example?

21 What harms did you learn about?

22 A. I learned about the dust blowing off of them. They
23 were going to actually put some surfactant on it so
24 that the dust wouldn't blow off.

25 Q. Okay, and did you learn about train safety as well as

1 an issue that was important to you?

2 MR. STURDIVANT: Your honor?

3 A. Yeah.

4 MR. STURDIVANT: I am going to object. These
5 are leading questions.

6 MR. GOLDSMITH: I agree that --

7 THE COURT: Overruled.

8 MR. GOLDSMITH: -- they are, your honor. I am
9 trying to get her focused and --

10 THE COURT: I will allow some --

11 MR. GOLDSMITH: Thank you.

12 THE COURT: The objection is overruled.

13 Q. (By Mr. Goldsmith) Did you learn about train safety as
14 well?

15 A. I did.

16 Q. And was that an important issue to you?

17 A. Yes.

18 Q. Was there something that happened in the summer of 2014
19 near your home that moved you to more action?

20 A. Yes.

21 Q. What was that?

22 A. There was a derailment underneath the Magnolia Bridge.

23 Q. Okay, and we have heard testimony about that already
24 today?

25 A. Yes.

1 Q. What did you do in response to that situation?

2 A. I -- can I just have a minute?

3 Q. Can you try to just answer that question?

4 A. Okay, can you tell it to me again?

5 Q. Okay, what did you do in response to that -- to
6 learning about that derailment?

7 A. I was really worried because that was right -- one mile
8 from my daughter's school, and there's a thing called
9 the blast zone that I learned about, and so anywhere
10 within a mile of an explosion, when an oil train
11 explodes, then you're supposed to evacuate that area --

12 Q. Right?

13 A. -- and my daughter's school was on the edge of that
14 area.

15 Q. All right.

16 A. And so I got very concerned, and I was very concerned
17 because before that I had learned a couple of other
18 things.

19 Q. Okay, and had you learned about train safety as well?

20 A. Yes.

21 Q. Okay.

22 A. So I had a driveway moment, and what happened was I was
23 driving home and I heard NPR, and there was a story on
24 the radio, and Ashley O'Hearn was telling the story of
25 this whistleblower, and this whistleblower was

1 inspecting a train in 2010, and it was during the
2 winter --

3 MR. STURDIVANT: Your honor?

4 A. -- Olympics --

5 MR. STURDIVANT: Objection. This is all
6 hearsay.

7 MS. BROCKWAY: I was listening to a radio
8 story.

9 MR. GOLDSMITH: I will ask another question,
10 your honor.

11 THE COURT: Okay, please ask another
12 question.

13 Q. (By Mr. Goldsmith) Okay, so you were concerned about
14 train safety, about train dust, about explosions?

15 Was climate change also an issue that you were
16 concerned about, Abby?

17 A. Absolutely. It is my number 1 concern.

18 Q. Okay.

19 What kinds of activities, up -- before September
20 2, 2014, did you do to try to effect change in those
21 areas of your concern?

22 A. Can you ask the question one more time, please?

23 Q. What types of things did you do to try to effect change
24 in those areas of your concern, train safety, climate
25 change and so forth?

1 A. So I am a member of a church, and I am a member of
2 Earth Ministry, which focuses on getting the faith
3 community to understand about caring for creation.

4 I am a member of Faith Action Network, and I --
5 and that is also a faith group that is an interfaith
6 group that once a year they go and they learn how to
7 legislate their representatives.

8 Q. So you joined groups?

9 Did you do other personal things like give
10 lectures or talks? Did you do that at all?

11 A. I did.

12 Q. Okay, where did you give lectures or talks about these
13 issues?

14 A. I went to my church and I told them about the
15 situations.

16 Q. Okay, have you written letters?

17 A. I have.

18 Q. How many?

19 Who have you written letters to about these
20 issues?

21 A. Well, I felt like I needed to address first the
22 executive, so I wrote President Obama, and he wrote me
23 back.

24 Q. Okay.

25 I have had this marked defendant's exhibit E.

1 (Brief Pause in Proceedings)

2 Q. (By Mr. Goldsmith) I am going to show you what has been
3 marked as defendant's exhibit E.

4 You can't show that to the jury. Just look at it
5 for a moment.

6 What is that -- without reading it, what is that,
7 generally?

8 A. This is a letter I got from President Obama.

9 Q. Okay, and were you satisfied with President Obama's
10 response to that letter?

11 A. I was excited to receive a letter from the president.

12 Q. Yes.

13 A. But when I read the policy, I was very disappointed by
14 what his plans were. I didn't think it was powerful
15 enough for the situation that we are in.

16 Q. So what other things did you do then besides write
17 letters?

18 Did you write letters to other legislators?

19 A. I did.

20 Q. Okay, and who? Do you remember who you wrote to?

21 A. Patty Murray.

22 Q. Okay, and what about -- did you ever go to the Seattle
23 City Council?

24 A. I wrote a letter to Dow Constantine.

25 Q. Okay.

1 What about Seattle City Council?

2 A. And I wrote a letter to Governor Inslee.

3 Q. Did you ever --

4 A. And I wrote a letter to Michael Bryant.

5 Q. Okay, he is a city council, Seattle City Councilman?

6 A. Yes.

7 Q. Okay.

8 Did you ever visit the city council?

9 A. I am feeling rushed. Can we just slow down a little
10 bit --

11 Q. I am trying to --

12 A. -- because I am kind of anxious and I just want to take
13 some deep breaths in between, and I am feeling like you
14 are in a hurry.

15 Q. Okay.

16 MR. GOLDSMITH: Your honor, can we take the
17 morning recess?

18 THE COURT: We are going to take a morning
19 recess so that counsel can talk with Ms. Brockway --
20 and that ought to make this go a little bit more
21 smoothly for all of us.

22 I will remind the jury, don't discuss the case
23 amongst yourselves or with anyone else nor consult any
24 media that might discuss this case or the issues
25 involved in the case.

1 All rise for the jury, please.

2 We will be in recess for 10 minutes.

3 (RECESS)

4 THE COURT: Please be seated everyone.

5 We are back in session.

6 I will remind everyone, no photography in the
7 courtroom without my permission.

8 Ms. Brockway, you remain under oath.

9 Mr. Goldsmith, please proceed.

10 MR. GOLDSMITH: I think we need the jury,
11 your honor.

12 THE COURT: Oh.

13 (Laughter)

14 MR. GOLDSMITH: There are a lot of people in
15 the courtroom.

16 THE COURT: It is so much easier without
17 them. Right?

18 (Laughter)

19 THE COURT: Let's get the jury, please.

20 (Brief Pause in Proceedings)

21 THE CLERK: All rise for the jury.

22 (Brief Pause in Proceedings)

23 THE COURT: Thank you.

24 Please be seated, everyone.

25 Ms. Brockway, you remain under oath.

1 Mr. Goldsmith, please proceed with your
2 examination.

3 MR. GOLDSMITH: Thank you, your honor.

4 Q. (By Mr. Goldsmith) Okay, so you told the jury about
5 your letter writing.

6 Did you ever testify before any legislature, city
7 council, state legislature?

8 A. Yes, before the Department of Ecology many times.
9 There's a lot of hearings --

10 Q. Okay.

11 A. -- for these proposals.

12 Q. About how many times did you testify at various
13 hearings?

14 A. Too many to count.

15 Q. Okay.

16 And did you start getting involved with -- well,
17 you know, actions or protests?

18 A. Yeah, I actually signed the Keystone Pipeline Pledge of
19 Resistance, and that was really pivotal for me.

20 A lot of times I sign a lot of petitions online,
21 but this was actually the time when you sign the
22 petition, and you promise to risk arrest if need be,
23 and 100,000 folks committed to that act, and it was
24 actually so powerful that the president didn't want to
25 embarrass the country by having all of these people,

1 you know, doing a protest like that.

2 Q. Okay.

3 A. So I found that very powerful.

4 Q. Did you -- did you also -- why did you feel the need to
5 get involved in specific actions like that?

6 A. Because everything that I did I didn't feel like it was
7 making any difference.

8 I would testify for two minutes and I -- at the
9 end I felt really excited because -- I mean at the
10 beginning I felt really excited because there would be
11 thousands of supporters, and there would be nobody
12 against the proposal, and then I felt like we weren't
13 heard.

14 It felt like an exercise that we participated in,
15 but it didn't feel like we were actually being heard
16 because the decisions weren't -- it felt like the
17 project were being rubberstamped, no matter what we
18 did.

19 No matter how the quality of our comments were,
20 and how large the crowds were, and how little the
21 opposition was, it just seemed like those were still
22 getting approved.

23 Q. Okay, and so did you get -- you got involved in the
24 protest type of actions, correct?

25 A. Yes.

1 Q. Okay.

2 What other types of things did you do then in the
3 protest action area?

4 A. Well I wouldn't say this is a protest action, but one
5 thing I did before protest is I prayed and I preached
6 at my church, and I was very active.

7 Q. Okay.

8 A. And so I really didn't feel like I tried a lot --
9 everything I could think of beforehand.

10 Before I switched to direct action, I actually
11 felt like I tried to work within the system to the
12 fullest extent possible.

13 Q. And are you still trying to get people to sign
14 petitions to this day?

15 A. I am.

16 Q. Okay.

17 And so what -- were you involved in other protests
18 where you were not arrested?

19 A. I was.

20 Q. For example, could you just name some of the other
21 protests you were involved in?

22 A. I was in charge of a support rally for an -- some
23 barrels that were put on a railroad track.

24 Q. And when was that, do you remember?

25 A. July of -- was it 20- --

1 Q. I can't answer, remember?

2 A. No, I am just -- I am just wondering out loud. I am
3 not --

4 Q. Okay, was it -- was it before the arrest in this case?
5 That's all we need.

6 A. Yes.

7 Q. Okay.

8 A. It was.

9 Q. And were you involved in other protests before the
10 arrest in this case?

11 A. What was that?

12 Q. A die-in, for example?

13 A. Oh, yeah, so --

14 MR. STURDIVANT: Your honor?

15 A. I --

16 MR. STURDIVANT: I am going to object again
17 to these leading questions.

18 THE COURT: I will overrule the objection.
19 Please answer the question.

20 Q. (By Mr. Goldsmith) Go ahead.

21 A. Yes. Yes.

22 Q. When -- what was that, briefly?

23 A. Actually, say the question again?

24 Q. You were involved in a die-in type protest?

25 What does that mean and when did that happen?

1 A. So there has been a lot of explosive trains that are
2 happening, and so these things are happening, and so
3 the -- 350 put one together by the stadium, and there
4 was one for Typhoon Haiyan, and these things were
5 happening, so we have been doing a lot of these
6 protests.

7 Q. So it is like people pretend like they are -- they are
8 on the ground like they are dying or something?

9 Is that what they do?

10 (Brief Pause in Proceedings)

11 Q. Is that yes?

12 A. Yes.

13 Q. Okay.

14 A. So I feel like there was a list of different things to
15 try that I got from 350.org, and it just had this
16 checklist of all of these things, so I did street
17 theater, for instance. We did the parade. It was
18 the -- the Fremont Parade, and we made a coal train,
19 and we marched in the parade, so I think art is very
20 powerful.

21 So I am an artist, so I went to art school, and so
22 to use art, even in -- poetry is very powerful, and
23 also in our liturgical dance in our church is very
24 powerful, and --

25 Q. Okay, and so you talked about the derailment, the

1 Magnolia derailment that was near your home?

2 Was that a key moment in your life?

3 And that was about July 2014?

4 Was that a key moment for you that you took
5 another step?

6 A. Yeah.

7 The very first step was Lac-Megantic, and what I
8 found out from Lac-Megantic was that -- that a train
9 exploded, and --

10 Q. Okay.

11 A. -- it was a brake problem.

12 Q. And so in 2014 there was a development near your home,
13 correct?

14 A. And so one year later was this derailment.

15 Q. Okay, so what did you do after that? Did you join a
16 group that was direct action? Go to a camp?

17 Do you remember that?

18 A. Yes, I do.

19 Q. Tell us about that.

20 A. So I -- the last straw that broke my back was actually
21 the Magnolia thing, and having it so close to my
22 daughter's school was very stressful for me, and I felt
23 powerless and feeling like there's a ticking time bomb.

24 And that's what it felt like.

25 So my daughter and I actually went to Backbone

1 Action Camp, and we learned to climb some trees, and
2 that is where I met Patrick Mazza, and I already knew
3 Liz Spoerri from 350 Seattle, and Patrick was also from
4 350.

5 Q. And so you joined the group of the other defendants for
6 this protest on September 2?

7 Is that how it came out?

8 A. And so at that camp we decided we needed to do
9 something more.

10 Q. Okay.

11 And so the action on September 2, was that
12 something more?

13 A. Yes.

14 Q. Okay, now let's look at a picture here.

15 I am going to show you what has been admitted as
16 Exhibit B.

17 Why don't you come on down?

18 MR. GOLDSMITH: If the court will allow her
19 to point to the picture in front of the jury?

20 Q. (By Mr. Goldsmith) Don't turn your back to them.

21 Point to the jury where you are in this picture,
22 exhibit B?

23 A. I am right there.

24 Q. Now were you scared?

25 A. No, I felt really powerful and -- up there.

1 Q. Okay.

2 And your sign, what was that all about, "Cut Oil
3 Trains, Not Conductors"?

4 A. "Cut Oil Trains, Not Conductors" -- I learned about a
5 Curtis Rucker who was a whistleblower, and he got
6 fired, and when he got fired -- I believe it was
7 unfairly -- from a brake inspection that he was
8 insisting on doing at the 2010 Olympics, and the
9 company insisted that he stop the brake inspection to
10 stay on schedule and move -- and he refused and he was
11 fired, and so what happened with that is --

12 (Brief Pause in Proceedings)

13 Q. (By Mr. Goldsmith) So why don't you have a seat here?
14 Have a seat.

15 Was there some activity with the union --

16 A. I learned --

17 Q. -- about what that --

18 A. -- about whistleblowers, and so this -- so they are
19 at -- it said "Cut Oil Trains, Not Conductors," and I
20 was really concerned about -- I joined Railroad Workers
21 United, and I learned a lot of stuff about -- about
22 rail safety.

23 Q. What is Railroad Workers United?

24 A. It is a group that was designed to keep the crafts from
25 in fighting and actually join together and actually

1 work together on safety issues in the industry.

2 Q. Okay.

3 A. And I joined as a solitary member. I don't -- I don't
4 run a train or anything like that.

5 Q. So did you also get involved in labor union issues
6 involving the railroad?

7 A. I did, and so one of the issues that I learned from
8 Railroad Workers United was it said -- there was a big
9 campaign about two-person crews, and they wanted to
10 reduce it to one, and the vote was -- it was September
11 2nd is the day that we protested, and I think the vote
12 was on September 10th, I think, or ninth, or
13 something -- so almost a week before.

14 Q. So your sign had something to do with that vote as
15 well?

16 A. Yes.

17 Q. So that was another area of your concern?

18 A. It was a big concern.

19 Q. And you felt it was urgent?

20 A. Yes.

21 I mean the vote was happening, and if there was
22 just a one-man crew then it would be just like Lac-
23 Megantic where they only had one crewmember on that
24 train.

25 Q. Okay, did you also -- there was some mention made of a

1 shell flotilla actually after this protest?

2 Were you involved in that protest?

3 A. Yes, I wasn't a kayaktivist. I was actually on the
4 land brigade, and one of the things that we were trying
5 to do is to prevent the workers from actually getting
6 in, because if we could just delay this project for two
7 weeks, then it was too dangerous for them to actually
8 go to the Arctic, because they only had a small window.

9 Q. Did you get arrested on that occasion?

10 A. No, I did not. I supported people that --

11 Q. And were you --

12 A. -- were arrested -- the Raging Grannies were arrested,
13 and I was a support person for the Raging Grannies.

14 Q. And was City Councilperson Mike O'Brien, was he
15 arrested, too?

16 A. He was, but that was the flotilla action --

17 Q. Okay.

18 A. -- and that was another team that was working.

19 I was on the land team and Mike O'Brien and the
20 Kayaktivists were in the water.

21 Q. So while you were up on that tripod on September 2nd,
22 whenever you had contact with a police officer or other
23 authority figure, what would you ask them?

24 Would you ask them to do something?

25 A. Wait, say that again?

1 Q. When you were up on that tripod?

2 A. Yeah.

3 I had a petition and I was petitioning the
4 government. I had a petition in my backpack and I --
5 it was -- one of my goals for this action was to call
6 for a moratorium on fossil fuel projects, and it was
7 targeted directly at Gov. Inslee.

8 And so I felt like I needed to be in that railroad
9 yard because it was the only location where I could
10 have a direct action that would say to both the
11 railroad company that "Workers, we are with you. We
12 care about workers' rights, we care about safety, we
13 care about moving through this community."

14 And on the other hand, we are trying to get our
15 government, our legislators who are representing the
16 people to stop listening to industry and actually
17 listen to the people who don't want these projects.

18 Q. Okay, now I am going to show you some pictures that
19 have been marked.

20 Look at the whole group. Don't show the jury,
21 they have not been admitted.

22 And this is a group that has been labeled
23 defendant's exhibits F, G, H and I.

24 A. Okay.

25 Q. Let's start with F. Why don't you look at that?

1 Just look at all of those pictures --

2 A. Okay.

3 Q. -- together.

4 Take a minute to do that.

5 (Brief Pause in Proceedings)

6 Q. (By Mr. Goldsmith) Okay, so do you recognize those
7 pictures, F through I?

8 A. I do.

9 Q. Do they depict you up on that tripod that day?

10 A. Yes, they do.

11 MR. GOLDSMITH: Your honor, I would move for
12 admission of defendant's exhibits F through I.

13 THE COURT: Any objection?

14 MR. STURDIVANT: No, your honor.

15 THE COURT: Exhibits F through I are
16 admitted.

17 MR. GOLDSMITH: Thank you, your honor.

18 Q. (By Mr. Goldsmith) Let's start with exhibit F, and if
19 you could step down again, we will show this to the
20 jury --

21 MR. GOLDSMITH: -- with the court's
22 permission?

23 THE COURT: Granted.

24 Q. (By Mr. Goldsmith) Okay, so this is exhibit F.

25 Why don't you tell the jury what you are doing in

1 this picture?

2 A. So this is the point when this cherry picker, which is
3 a fire engine, has -- it is a fire ladder and it came
4 up, and there were some firefighters in there, and I
5 asked them if they would sign my petition, and they
6 said that they were not allowed to sign my petition
7 because they had their uniform on, and I said to them,
8 "Well after you tuck your children in at night, and you
9 take off your uniform, and -- would you please go to
10 the computer, and we have a petition online that you
11 can sign that would" -- and this is very particular for
12 firefighters, because firefighters are in great danger
13 when -- when there is a train explosion. There is no
14 way to actually do anything. You have to just run away
15 from that, and the firefighters are concerned about
16 that.

17 Q. Okay, so is this packet -- what is that package you are
18 handing the firefighter?

19 A. That has the petition in it. That has my signed
20 petition in it and it has an empty one for the
21 firefighters to sign.

22 Q. Okay, so did they actually accept that package?

23 A. Well --

24 Q. As far as you know?

25 A. So --

1 MR. STURDIVANT: Your honor, relevance?

2 Q. (By Mr. Goldsmith) Well do you know what happened to
3 that manila envelope?

4 THE COURT: Hold on.

5 Mr. Goldsmith, are you conceding the objection?
6 Is that what I am hearing?

7 MR. GOLDSMITH: I will concede the objection.

8 THE COURT: All right. Sustained.

9 MR. GOLDSMITH: We will move on to the next
10 picture.

11 THE COURT: Thank you.

12 Q. (By Mr. Goldsmith) Do you remember what is happening
13 here, exhibit G?

14 A. Well, yeah, we were talking about that petition, and
15 negotiating about whether they are going to sign it or
16 not, and then I am trying to slowly give them one thing
17 at a time so I had this sign that says, "If you are
18 looking for a sign, this is it"; and the other one says
19 "Rise up," and so I was just heading off these things
20 one at a time.

21 I had a coat. I had a backpack. I had a lot of
22 gear up there because I was planning on staying up
23 there for a long time.

24 Q. Okay, you had some drinks with you, and food as well?

25 A. Water, food, yes.

1 Q. You were wearing a diaper?

2 A. Yes.

3 Q. How long were you up there total?

4 A. Eight hours.

5 Q. And how long were you planning to stay up there if they
6 hadn't taken you off of the tripod?

7 A. I wasn't sure. I hadn't been up there. I didn't know
8 how I was going to feel.

9 So once I was up there, I really wanted to stay up
10 there as long as I could.

11 Q. You were going to stay overnight?

12 A. Well, I -- I struggled with that because I wanted to
13 see if all of my goals were met, and I wasn't sure.

14 I had a lot of hopes, and I wasn't sure if all of
15 them were going to be met, or how many to be satisfied
16 with, because I knew this was a really powerful and
17 important part and I didn't want it to end.

18 Q. Have a seat.

19 So actually, before you sit down, let's just look
20 at the other two pictures.

21 In this picture, which is defendant's exhibit H,
22 can you explain to the jury what is going on there?

23 A. So I am --

24 Q. Hold it up for the jury to see.

25 A. Okay.

1 I believe that -- I was attached to this tripod,
2 so if I fell off, there is a -- there is a rope that
3 catches me, and so that had to be disconnected.

4 But also before they did that, they have to
5 connect a safety line to this cherry picker so that I
6 am always latched in at one point.

7 Q. So that's what that line is is their safety line?

8 A. It is their safety line attached from the cherry picker
9 to myself.

10 Q. Okay, I am going to show you the final one, which is
11 defendant's exhibit I.

12 Make sure the jury can see that and explain what
13 is happening there.

14 (Brief Pause in Proceedings)

15 A. Oh, I am just stepping off the tripod and making it
16 into the cherry picker, and the firefighters are making
17 sure I don't fall off or trip.

18 Q. Okay, why don't you have a seat now for a moment?

19 This is hard to hide from the jury, but this has
20 been marked as defendant's exhibit N.

21 Can you identify that?

22 A. Yes, this is the thing that I had on top.

23 Not knowing how the action was going to go --

24 Q. Okay --

25 A. Oh.

1 Q. -- is that --

2 A. Sorry. Sorry.

3 Q. So that is the item that you had with you on the tripod
4 that day?

5 A. Yes.

6 Q. And depicted in some of the pictures that have been
7 admitted?

8 A. Yes.

9 MR. GOLDSMITH: I would move to admit
10 defendant's exhibit N.

11 THE COURT: Any objection?

12 MR. STURDIVANT: No, your honor.

13 THE COURT: N is admitted.

14 Q. (By Mr. Goldsmith) Go ahead, finish the -- tell us
15 about that.

16 Tell us about that. Is that a homemade item?

17 A. Yes.

18 Q. Okay, so what was -- why did you have it up there with
19 you?

20 A. Because I -- this is something that you can buy time --
21 when you do an action like this, you don't know if you
22 are going to be picked off in one hour, or if they are
23 going to let you stay longer, and so this is -- this
24 was something that -- I wanted to stay at least for the
25 day.

1 You know -- I mean we haven't talked about my
2 goals, but -- but I wanted to be able to have this as
3 an option so I could stay longer -- if they decided to
4 come straight after me, then at least I could buy some
5 time if the media was trying to get there and I wanted
6 to tell my story.

7 I really needed to tell this story. We -- "we"
8 needed to tell this story.

9 Q. And did you actually attempt to put your arm in there
10 and lock yourself in place for a longer period of time?

11 A. When, at --

12 Q. Near the end of the --

13 A. I --

14 Q. As has been described by other witnesses?

15 A. So as the firefighters were coming up, I could see them
16 coming up and I was trying to make a checklist and say,
17 "Okay, did we meet all of our goals?"

18 And I started to get nervous, and I wanted to stay
19 longer, but I have these messages that were grounding
20 messages on here, and so this one reminds me of my
21 daughter and reminds me that I'm a mother --

22 MR. STURDIVANT: Your honor? Objection,
23 nonresponsive.

24 THE COURT: Sustained.

25 Q. (By Mr. Goldsmith) So why don't you describe what --

1 what you did, what you were trying to do?

2 A. I was trying to -- I was struggling with the fact that
3 I was a mother and --

4 Q. So you were trying -- were you trying to put your arms
5 in there, Abby?

6 A. I wanted to stay longer, but because I was a mother, I
7 decided that that was enough, that I had made enough of
8 a point that it was going to be more harmful with me if
9 I stayed overnight -- for my family, for a lot of
10 different people.

11 If I didn't have a family, I would have
12 absolutely, and this was my grounding message to say
13 "that's enough."

14 Q. So you -- you attempted, but didn't finish the attempt
15 to put your arm in there, is that a fair statement?

16 A. I actually made the choice of --

17 Q. Okay.

18 A. I didn't know what it felt like up there. I didn't
19 even know if this was long enough, like you would have
20 to latch it with something underneath there, and I
21 wasn't even sure if my -- if it would latch or not
22 latch.

23 Q. Okay, so what were the goals that you had that day?

24 A. Well the first one was definitely towards Governor
25 Inslee to have a fossil fuel moratorium -- to have him

1 reject all new fossil fuel structured projects.

2 And another goal was to let the railroad workers
3 know that we love trains and we support workers, but we
4 don't accept coal trains and oil trains coming through
5 and trespassing in our communities.

6 Q. So did you think your actions were necessary to prevent
7 those harms?

8 A. Absolutely.

9 I felt like -- it was very symbolic that we chose
10 to trespass because I felt that the railroad and the
11 oil and even -- they were trespassing against us.

12 Q. Okay, thank you.

13 MR. GOLDSMITH: I have nothing further, your
14 honor.

15 THE COURT: Any other defense counsel wish to
16 question Ms. Brockway?

17 MS. McCALLUM: No, your honor.

18 MR. JOYCE: No questions.

19 THE COURT: Mr. Mazza?

20 MR. MAZZA. No, your honor.

21 THE COURT: Cross-examination?

22 * * * * *

23 C R O S S - E X A M I N A T I O N

24 BY MR. STURDIVANT:

25 Q. Good morning, Ms. Brockway.

1 A. Good morning.

2 Q. How are you?

3 A. Great.

4 Q. So you did know you were trespassing, correct?

5 A. Absolutely.

6 Q. And you were -- you were informed that you were
7 trespassing as well?

8 A. Yes.

9 Q. And you were asked to leave?

10 A. I was.

11 Q. And you refused?

12 A. Yes.

13 Q. And was it your intent that day to delay a train?

14 A. Yes.

15 Q. You said you had goals when you were up there, correct?

16 A. Yes.

17 Q. Have you heard from Governor Inslee?

18 A. He has not written me back.

19 Q. And you said you have done several other things like
20 the Shell oilrig?

21 A. Yes.

22 Q. You were on the land, and you weren't arrested for
23 that?

24 A. I was not.

25 Q. Is that because it wasn't illegal?

1 A. No, I was working with people that were getting
2 arrested, so I was supporting them.

3 Q. Okay, but what you were doing was not illegal? That's
4 a yes or no question?

5 MR. GOLDSMITH: Your honor, I object to him
6 characterizing his questions as yes or no.

7 THE COURT: Well it calls for a legal
8 conclusion. Sustained.

9 Ask another question.

10 MR. STURDIVANT: Thank you, your honor.

11 Q. (By Mr. Sturdivant) And you have campaigned before and
12 gone to environmental protection -- excuse me, the
13 Department of Ecology public hearings?

14 Is that correct?

15 A. Yes, in fact I -- those same Raging Grannies, we had
16 another action at the Olympia place, and so when we
17 were there, before the hearing to show -- to try to get
18 more people to turn out, we made a quick video --

19 MR. STURDIVANT: Your honor, I am going to
20 object as nonresponsive.

21 THE COURT: Mr. Goldsmith?

22 MR. GOLDSMITH: I think she was just about
23 finishing with her answer.

24 MS. BROCKWAY: I'm fine.

25 THE COURT: I will just sustain the

1 objection.

2 Please ask another question.

3 Q. (By Mr. Sturdivant) Are you going to continue to be
4 active in going to public hearings?

5 A. Absolutely. There is one --

6 Q. Do you believe that's --

7 A. -- that was yesterday --

8 Q. -- important?

9 A. -- and is continuing, and I am going to write a letter.

10 I am not going to physically go there, but I can
11 submit also online, and so there's still a window of
12 opportunity for Tesoro Savage project, which is the
13 largest project in North America. It is an oil by
14 rail --

15 Q. Do you believe that going to those hearings is
16 effective and important?

17 A. I think I need to split that question in half, because
18 one, it is important, it is absolutely important.

19 Do I think it is effective? Absolutely not.

20 Q. Okay.

21 MR. STURDIVANT: Nothing further, your honor.

22 * * * * *

23 R E D I R E C T E X A M I N A T I O N

24 BY MR. GOLDSMITH:

25 Q. Abby, have you ever been arrested before or since

1 September 2?

2 A. I have not.

3 Q. Thank you.

4 MR. GOLDSMITH: I have nothing further.

5 THE COURT: Any other redirect from any
6 counsel?

7 MS. McCALLUM: No, your honor.

8 MR. MAZZA. No, your honor.

9 THE COURT: Any recross?

10 MR. STURDIVANT: No, your honor.

11 THE COURT: Thank you, ma'am, if you could
12 please step down?

13 Does the defense have any further witnesses this
14 morning?

15 (Brief Pause in Proceedings)

16 THE COURT: Are there any further witnesses
17 this morning from the defense?

18 MR. JOYCE: Your honor, Dr. Millar won't be
19 present until approximately 1 PM.

20 THE COURT: All right.

21 Ladies and gentlemen of the jury, we will now be
22 breaking again. Things are moving along more quickly
23 than we expected, which is a good thing, but it does
24 cause delays, as it is difficult to schedule these
25 things.

1 We have to sort of anticipate when witnesses will
2 conclude their testimony.

3 So we will break until 1 PM this afternoon where
4 we will pick up with further testimony.

5 I would anticipate -- I believe that's the only
6 other witness available today.

7 Is that correct?

8 MR. GOLDSMITH: That is correct, your honor.

9 Our last witness cannot get here until 9 AM
10 tomorrow morning.

11 I will get him here at 8:30, your honor.

12 THE COURT: All right, so I just wanted to
13 give you a preview that it is likely we are going to
14 finish early this afternoon, in case you need to make
15 arrangements in your own lives.

16 I don't know what time that will be because I have
17 no idea how long the one witness we will have this
18 afternoon will take to testify, but at this point I
19 will remind you not to discuss the case amongst
20 yourselves or with anyone else, or seek out or review
21 any media that might be discussed and the issues in
22 this case or this case in particular.

23 All rise for the jury. We will see everyone at 1
24 o'clock.

25 (The jury leaves the courtroom)

1 THE COURT: Counsel, are there any matters to
2 take up before we come back?

3 MR. GOLDSMITH: I don't have any, your honor.

4 THE COURT: All right, we will see you all --

5 MR. STURDIVANT: None from the state.

6 THE COURT: -- at 1 o'clock.

7 (RECESS)

8 THE COURT: Good afternoon, please be seated.
9 It feels lonely in here.

10 All right, is the defense ready to call its next
11 witness, or is there anything else we need to do before
12 we bring the jury in?

13 MR. JOYCE: Defense is ready.

14 THE COURT: Let's get the jury, please.
15 Anything from the state?

16 MR. STURDIVANT: No, your honor.

17 THE CLERK: All rise for the jury.

18 (The jury returns to the courtroom)

19 THE COURT: Thank you. Please be seated.
20 Good afternoon, ladies and gentlemen.
21 The defense may call its next witness.

22 MR. JOYCE: Defense calls Mr. Fred Millar.

23 (Brief Pause in Proceedings)

24 THE COURT: Sir, please approach me and raise
25 your right for me.

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FRED MILLAR IS SWORN

THE COURT: Thank you. Please have a seat.

Please state your name and spell your name, your last name for the record?

MR. MILLAR: My name is Fred Millar, M-I-L-L-A-R.

THE COURT: Thank you, Mr. Millar.

You have some microphones in front of you, but they are not amplifying your voice in any way. They are only recording you, so keep your voice up so everyone can hear you.

MR. MILLAR: Okay.

THE COURT: Mr. Joyce, please proceed.

* * * * *

D I R E C T E X A M I N A T I O N

BY MR. JOYCE:

Q. Good afternoon, Mr. Millar.

A. How are you doing?

Q. Thanks for coming in.

Could you please describe your background in the rail safety field?

A. Well I have been working in issues about hazardous materials, transportation generally for about 30 years -- first of all working with the Environmental Policy Institute, and then Friends of the Earth, an

1 environmental group in Washington, DC.

2 In the course of doing that kind of work, I have
3 testified in Congress. I have testified in several
4 state legislatures. I have written some congressional
5 language and bills, and actually initiated one of the
6 two major federal right to know laws that we have in
7 the United States -- the Clean Air Act Amendments of
8 1990, which regulates about 13,000 chemical facilities
9 in terms of their needing to provide information to the
10 public about their risks.

11 So that was the earlier history and -- and I have
12 also been a consultant to the Brotherhood of Locomotive
13 Engineers, the rail union that is now within the
14 Teamsters union -- and a rail safety consultant also
15 with some insurance companies -- with an insurance
16 company that is looking at those kinds of risks of
17 allowing dangerous cargoes through major cities.

18 The crude oil issue is much newer than that and
19 has come up more recently, so -- but all of us are
20 learning, on a high learning curve about that issue
21 right now as well.

22 Q. Okay.

23 And have you reviewed any materials in preparation
24 for today's testimony?

25 A. Yes, I looked at lots of materials just in general

1 about the risks of crude oil by rail.

2 Q. And could you go into a little more detail about your
3 legislative efforts?

4 A. Well the legislative efforts, and in terms of the
5 Congress were that -- I was -- since I was kind of an
6 expert about chemical safety, and also hazardous
7 materials transportation, I was asked to submit some
8 language for bills that would be used and -- by the
9 proponents in the Congress, and in those things there
10 happened to be some quite good cooperation between the
11 Republicans and the Democrats in Congress, and we
12 actually got some environmental laws passed that were
13 quite good.

14 And so that was section 112R, for example, of the
15 Clean Air Act Amendments of 1990 -- was what I
16 initiated, and I provided the information to the
17 legislative drafters and they put it into the bill.

18 Q. And could you describe for us some of the safety and --
19 safety issues inherent in transporting these materials?

20 MR. STURDIVANT: Your honor, at this time I
21 would like to be heard outside the presence of the
22 jury.

23 THE COURT: All right, thank you.

24 Ladies and gentlemen we will excuse you for a
25 short while.

1 Don't discuss the case amongst yourselves or with
2 anyone else.

3 All rise for the jury, please.

4 (The jury leaves the courtroom)

5 THE COURT: All right, everyone can be
6 seated. The jury is out of the courtroom now.

7 Mr. Sturdivant?

8 MR. STURDIVANT: Your honor, I would object
9 to this testimony going in.

10 We spent the better part of -- all this morning
11 hearing about the dangers of rail safety and
12 transporting fossil fuels, as well as oil on rail
13 lines. Why do we need to go through it again?

14 THE COURT: Mr. Joyce?

15 MR. JOYCE: Your honor, this expert here
16 today, in comparison to Mr. De Place, has had 30 years
17 specific to the transportation of crude oil and other
18 hazardous materials, and he also has more knowledge
19 about the specifics of rail infrastructure, the safety
20 of the cars involved, and other specific things that
21 Mr. De Place was not an expert for that are relevant to
22 the issues before us today -- and in large part the
23 motivation for the defendants -- the safety of the
24 transportation of these materials.

25 THE COURT: Mr. Sturdivant?

1 MR. STURDIVANT: Your honor, Mr. De Place
2 testified at length about the design flaws of the
3 railways -- the amount of them that are going through
4 now and all of the dangers of the actual system if they
5 actually do spill, turn over, explode.

6 We went into that for over 15, 20 minutes.

7 MR. JOYCE: My recollection was that he
8 mentioned the valve in one of the cars and didn't
9 really have any specific expert testimony about issues
10 relevant to these cars.

11 THE COURT: I considered Mr. De Place's
12 testimony on these issues to be general in nature and I
13 am relying on representations of counsel that we are
14 going to get into more specific information from this
15 expert witness.

16 I will allow it at this point. You can raise your
17 objections later if you believe that it is nothing more
18 than duplicitous.

19 Let's the jury, please.

20 (Brief Pause in Proceedings)

21 THE CLERK: All rise for the jury.

22 (The jury returns to the courtroom)

23 THE COURT: Please be seated.

24 Mr. Joyce, please proceed.

25 Q. (By Mr. Joyce) Mr. Millar, I am going to jump right

1 into another topic.

2 Would you describe for us issues about the safety
3 of the railcars used for the transportation of these
4 materials in our region?

5 A. Yes, and in general there are about seven major issues
6 involved in the transporting of these cargoes,
7 including the quality of the tank cars.

8 The very first problem is that the railroads have
9 imposed on the industry -- on the country, a brand-new
10 method of operation with crude oil, which is unit
11 trains of crude oil, meaning trains that are averaging
12 100 cars, and they go anywhere from 80 to 150 cars.

13 These trains are very hard to handle; in fact
14 the -- the union official for the Canadian rail union
15 said that these cars are -- that these trains are too
16 long, too heavy and going too fast.

17 So those are -- the union -- the unit train
18 operation transcontinentally across the country was
19 kind of a new development that the railroads imposed.

20 They are using tank cars, also, that the National
21 Transportation Safety Board has, for 30 years, been
22 saying are inadequate.

23 They don't use the word "tin cans on wheels," but
24 what they say is, in their diplomatic language, they
25 say the DOT 111 tank cars, and any serious collision or

1 derailment, quote, "Should be expected to lose its
2 contents," unquote.

3 Q. And are these cars the most typical car used in the
4 transportation --

5 A. This is the vast majority of the fleet used for crude
6 oil is the DOT 111 tank cars, and in fact they are
7 still going to be used for the foreseeable future
8 because there's so many of them out there that
9 replacing them is very big difficult deal.

10 And so under the current situation, that danger
11 will continue.

12 Now the speed the car goes -- you know, the union
13 guy said they are going too fast. The speed has been a
14 very -- a very key point of contention because in part
15 the National Transportation Safety Board had a big
16 safety forum in April 2014 in which the main safety
17 expert for the Federal Railroad Administration,
18 after -- he said publicly, after looking at our
19 research about the punctures -- punctureability of
20 these tank cars if -- if unit trains are moving at 30
21 to 40 miles per hour, you cannot build a tank car that
22 will withstand punctures at that speed. You cannot
23 build a tank car that can withstand punctures if the
24 trains are moving 30 to 40 miles per hour.

25 So that is a very -- that is a very severe bottom

1 line because then everybody in this big expert -- group
2 of experts from the government and from the -- and from
3 the industry turn and look at the railroad people and
4 say, "What can you do for us about slowing down your
5 trains?"

6 And the -- and the railroad word was, "Well, not
7 much. We have already agreed to slow them down to 50
8 miles per hour through most of the country, and 40
9 miles per hour through the -- a few of the big
10 cities -- but if we slow down our trains even further
11 than that, we will be slowing down lots of other
12 people's trains, and I want you gentlemen to know
13 that" -- this was the head of the Association of
14 American Railroads is saying to this whole group, "I
15 want you gentlemen to know that our biggest single
16 corporate customer --

17 MR. STURDIVANT: Your honor, objection.

18 A. -- is" --

19 THE COURT: Hold on, sir.

20 MR. MILLAR: Sorry.

21 MR. STURDIVANT: Hearsay.

22 THE COURT: Your response, counsel?

23 MR. JOYCE: He is an expert. He is relying
24 on a published opinion of another expert.

25 THE COURT: That's not what he said. He is

1 talking about what someone else said. It is hearsay.

2 MR. JOYCE: May I follow up with a question?

3 THE COURT: Go ahead.

4 Q. (By Mr. Joyce) Was this a published --

5 A. This was a videotape of a -- of a national safety forum
6 in which the whole idea was to get the best experts
7 from the government and the industry talking to each
8 other in public -- exactly for this purpose, to get the
9 truth out there, and some of the truths were quite
10 startling, and it is clear that the railroad testimony
11 was, "We are not going to slow down our trains to what
12 would make it possible not to have accidents and
13 derailments with punctures."

14 Q. Would you discuss with us some of the safety issues
15 about the infrastructure of the rails?

16 A. Well the -- these trains have been coming off the rails
17 in great numbers. I mean we have had lots of accidents
18 and -- and the -- again the Secretary of the Department
19 of Transportation said publicly on television the
20 infrastructure was not ready for this. We don't have
21 an adequate infrastructure there.

22 Everybody knows that and has tried -- there's ways
23 of -- everybody wants to try to work on that, but it is
24 a serious problem. There's crumbling bridges and there
25 is -- and there's worn track and so forth.

1 So the -- the other thing that is probably
2 important for people to realize is that there is a
3 whole routing aspect of this. I mean these trains are
4 not being routed around our major cities. They are
5 being routed through our major cities.

6 Q. Would you discuss the safety issues with that -- being
7 brought through the major cities?

8 A. The safety issue is that -- is that even the federal
9 Department of Transportation has said in its published
10 documents that a really important way to reduce risks
11 would be to reroute around major cities, but then they
12 propose regulations that don't do that.

13 Q. And why is that, sir? Why aren't those regulations
14 being enforced?

15 A. Because -- because -- well, the railroad industry
16 basically got a law passed in Congress in 2007, and I
17 was very active in that whole controversy in 2007.

18 The railroad industry got a law passed in Congress
19 that said they don't have to reroute them around cities
20 as a matter of course, they can -- they can use their
21 own judgment about whether to reroute around cities,
22 and they can make all of their decisions in complete
23 secrecy.

24 So the federal government -- all of the experts
25 have said again on the record in these hearings about

1 this particular issue of crude oil on trains, it is
2 impossible to know whether the railroad industry is --
3 is valuing safety at all.

4 It is all secret decisions by a railroad industry
5 that really has a quite keen interest in moving the
6 stuff -- you know, quite expeditiously.

7 So besides -- besides the question about the --
8 the speed of the trains and the -- and the railcars,
9 there is a question about the volatility of the cargoes
10 and -- and the basic situation there is that the
11 federal government has punted to some North Dakota
12 regulators.

13 That question has been -- has been given over to
14 the North Dakota regulators to decide what should be
15 the volatility standards for shipping these ultra
16 dangerous cargoes around the country.

17 Q. Could you discuss briefly some of the volatility?

18 I know you are not a chemist, but in your review
19 of the safety issues, would you discuss some of the
20 volatility issues with transporting Bakken crude?

21 A. Well the main thing to say about that is just that
22 Bakken crude is a crude oil. It falls within a very
23 wide range of crude oils.

24 It has the same placard, 1267, on the railcars, as
25 all the other crude oils, but crude oil is a very wide

1 term that ranges from very heavy crude oils that when
2 it gets in the water it just sinks to the bottom and is
3 very hard to get out, to very light crude oils, and all
4 kinds of gray issues in between.

5 We all get the same placard, 1267, on the
6 railcars, so that the fire service can identify them as
7 flammable cargoes. They are all highly flammable
8 cargoes.

9 So the Bakken crude has got -- is very light and
10 has got a lot of butane and methane and other kinds of
11 volatile components, which means that when you have a
12 puncture of a railcar, those components come out first
13 and -- and form an enormous fireball.

14 I mean you are given that most derailments have a
15 lot of ignition points -- you know, friction and
16 punctures and what not, so -- so it is metal on metal
17 on metal all over the place. Right?

18 So basically that means that we have seen pictures
19 in the American media and Canadian media of these big
20 fireballs because of the volatility of that, and then
21 once one car gets caught on fire, the problem again
22 with the unit trains is that then it tends to set off
23 other cars, you know?

24 If one car is releasing its content, you can get
25 burning oil going under another car, and then that

1 creates a thermal tear on the next railcar, which then
2 releases its contents, and sometimes the fireballs go
3 on for a couple of hours, and in some places the fires
4 are allowed to burn for four days.

5 I mean you can get fires and fires and fires.

6 Q. What are the implications of that possibility for
7 highly populated areas?

8 A. For which?

9 Q. Highly populated areas?

10 MR. STURDIVANT: Your honor, objection, calls
11 for speculation.

12 MR. JOYCE: Your honor, this is the very
13 matter that the expert studies. It is a safety issue
14 that is inherent to rail transport of these materials.

15 A. Yeah, there's one -- there's one way to --

16 THE COURT: Hold on.

17 MR. MILLAR: I'm sorry.

18 THE COURT: I have not heard anything that
19 would establish him as an expert on how fires affect
20 communities, so if you want to lay a proper foundation
21 for that opinion testimony, then I will allow it, but
22 not at this point.

23 Go ahead, counsel.

24 Q. (By Mr. Joyce) We will come back to that.

25 Would you discuss the frequency of rail accidents

1 in the country?

2 A. Well we have had a lot of -- we have had a lot of rail
3 accidents with crude oil by rail, and it wasn't just
4 Lac-Megantic, it was a whole panoply of accidents that
5 happened after that, almost one a month.

6 I mean we -- and in fact even in 2015 we had seven
7 major accidents in 2015 and more damage from those
8 accidents than any previous year.

9 So the accidents are continuing.

10 Now the rail industry will say that in general
11 their accident rates in general over many years have
12 declined somewhat, but the fact is there has been this
13 up tick in terms of the crude oil cargoes and the crude
14 oil damages.

15 The way the federal government measures the impact
16 is in what they call "societal damage," and in their
17 federal regulatory documents they use the term
18 "societal damage," meaning how much might it cost a
19 community or the society if you have some serious
20 accidents.

21 And what they predicted was that given -- given
22 what we can tell from what is going on, what they
23 predicted in the federal regulatory documents was that
24 over the next 20 years, we could have as many as 10
25 rail derailments per year, over a 20 year period, and

1 that one of those could be a derailment that cost \$1
2 billion.

3 And then over the 20 year period, one of the
4 accidents that happened could be in a major area, a
5 metropolitan area, or in a major environmental
6 resource -- let's say the Columbia River -- and could
7 cost \$8 billion.

8 So that is -- that is just a way of quantifying
9 the impact of the derailments -- if we had the
10 predictions -- how they qualified this by saying if we
11 pass very strong regulations, we won't have as much
12 severity of accidents in the future, and of course what
13 I -- what I would conclude is -- in looking at what
14 they actually have done is that they have not
15 significantly reduced the -- the amount of societal
16 damage that can be expected by their own earlier
17 calculations in 2014.

18 Q. The community in Lac-Megantic was not a big community,
19 in your assessment?

20 A. I'm sorry, in?

21 Q. In Lac-Megantic?

22 A. In Lac-Megantic, that was a very tiny community, and
23 the thing about Lac-Megantic was it was just a little
24 resort town on a lake -- Lac-Megantic -- and it was in
25 the middle of the night.

1 This was not a worst-case scenario. It was in the
2 middle of the night. There was nobody at work, there
3 was nobody at school, there was only one thing open in
4 town and that was a little music café, because two
5 groups were having birthday parties for their friends.

6 And so that group -- when the smokers went out to
7 smoke, they heard this huge crash, and the reason was
8 that a whole unit train of crude oil had rolled 12
9 miles downhill when its brakes -- when its brakes
10 failed on a hill, rolled 12 miles downhill.

11 When it got to the little town and a curve, it ran
12 off the tracks into the town, into the downtown.

13 Train cars -- railcars stacked up, started setting
14 off each other.

15 When the people who went out to smoke heard the
16 huge crash, they ran up the hill -- they reported --
17 and then they had to look back and see all their
18 friends burn up in this huge conflagration.

19 Now what they described was rivers of fire.

20 And so there has been an academic study about
21 that, what could happen in terms of a release of one
22 and a half million gallons of crude oil in a tiny --
23 you know, in a tiny community.

24 Well, it depends on the slope, because it is going
25 to be a liquid flow of rivers of fire.

1 That is going to be real important to think about
2 in terms of places in Washington State like Spokane
3 where you have got elevated tracks coming through the
4 city.

5 Now I haven't been to Spokane, but I went to
6 Richmond, Virginia, and the fire chief asked me to come
7 and look at his elevated tracks, and he told me that --
8 "Do you see these elevated tracks for Richmond,
9 Virginia?" He said, "My nightmare is a whole unit
10 train of crude oil falling off these tracks into my
11 city and blowing up" -- because he has got crude oil
12 through his town, too, on the way to the Atlantic
13 Ocean.

14 Q. Are you aware of firefighter associations in Washington
15 State that have requested information from BNSF about
16 the safety --

17 A. Yes, there has been a lot of concern. I mean I have
18 been in touch with a lot of people in Washington State
19 over the last three years, and there has been a lot of
20 concern from your legislators, from your citizen
21 groups, from your media, and from your -- your
22 congressional delegation has been really active on this
23 issue.

24 The Washington Fire Chiefs Association, the
25 statewide Association of Washington Fire Chiefs wrote a

1 letter to BNSF and said, "We need to see your hidden
2 risk documents. We need to see the documents that you
3 have that describe what you know about your risks."

4 Now there's four types of those that they asked
5 for specifically. "We want to see your worst-case
6 accident scenarios"; in other words, "Tell us what you
7 think could happen, what do you estimate could happen
8 with a unit train of crude oil and a derailment?"

9 Secondly, "What is your catastrophic insurance
10 like? How much catastrophic insurance do you carry?"

11 It turns out the railroads in general do not have
12 enough catastrophic insurance and they have testified
13 in Congress to that fact.

14 They testified, "We don't -- we don't have enough
15 insurance."

16 In fact they said -- they used colorful language,
17 they said, "When we bring our most dangerous cargoes
18 through major cities, we are betting the railroad,
19 because we could have disasters that go far beyond our
20 ability to cover it. We don't have adequate insurance.

21 They are going to Congress to get, you know, what
22 kind of new insurance, like they would like to get.

23 In any case, the third document that the
24 Washington fire chiefs requested was the -- was the
25 routing documents for the -- for the -- you know, "What

1 kind of routing decisions have you made in Washington
2 State about -- about these, and the full set of
3 documents, your emergency response plans, your
4 comprehensive emergency response plans?"

5 The Fire Chief are saying, "We don't have the most
6 basic kinds of risk documents that we need to assess
7 our own capabilities, and what kind of training and
8 what kind of resources we need to have."

9 And so the answer from BNSF came in a letter, and
10 it was a very brief letter because what it said was,
11 "Well, we are not planning to send you any" -- I am
12 paraphrasing -- "We are not planning to send you any
13 information, but can we talk?" -- which means "Can we
14 have" -- and I -- and my -- you know what I was told
15 that that merely means --

16 MR. STURDIVANT: Objection, your honor.

17 A. -- is they want --

18 MR. STURDIVANT: Calls for --

19 A. I could just describe the letter.

20 THE COURT: The objection is sustained. The
21 jury will disregard.

22 Ask another question, Mr. Joyce.

23 Q. (By Mr. Joyce) When was this request?

24 A. The request was several months ago, and I checked in
25 with the Washington fire chiefs last week and they

1 said, "We are still being rebuffed by BNSF."

2 Q. So in your opinion, BNSF doesn't provide the public
3 with the information they need regarding the dangers of
4 transporting?

5 A. Well you know that is actually kind of a different
6 question because the understanding throughout the
7 country is that it is okay for the government to
8 require the railroads to provide information to the
9 public officials, and to the emergency response
10 community, but it is also okay for those people not to
11 tell the public at all -- keep the public in the dark
12 about it.

13 I mean the Obama administration is on record about
14 that, and -- and in fact that's the way it has been for
15 many years, that the railroads will sometimes tell a
16 fire chief a little bit about the hazards, provided the
17 fire chief signs a written agreement that is in the
18 railroad's own documents saying, "We promise not to
19 give this information to the public."

20 Q. And in your being -- in your opinion and experience in
21 dealing with legislative bodies, does citizen pressure
22 have an effect on the their regulation?

23 A. Oh, yes, citizen pressure on legislators and regulators
24 can really have a really important impact.

25 However, there's all these limitations to that. I

1 mean the -- the fact is that the Federal Railroad
2 Administration, who ought to be the agency that is
3 actually out there actively trying to make crude oil
4 safe, that is -- that is what a lot of people would
5 call a captive agency, and I can illustrate that in
6 some depth in terms of what they have not done in terms
7 of regulating, and the best way to do that is look at
8 the National Transportation Safety Board.

9 That is the -- that is the group that actually is
10 an independent group that investigates accidents, the
11 National Transportation Safety Board.

12 They have done wonderful work in aviation and in
13 other kinds of -- in making airplanes safer, because
14 they investigate these accidents up the wazzu. They
15 really do a great job.

16 And then they make recommendations about what
17 ought to get done.

18 Well they also have been investigating rail
19 accidents for some time, and 20 or 30 years ago they
20 told the FRA, "We need a new tank car for these
21 flammable cargoes," and FRA did not move.

22 20 or 30 years ago they told the Federal Railroad
23 Administration that they need to have a collision
24 avoidance technology called "positive train
25 technology" -- "positive train controls," sorry --

1 "positive train control" that can prevent collisions.

2 FRA did not act.

3 Congress had to come along and demand it, that FRA
4 pass a regulation on it. Congress had to legislate it
5 specifically. That is not what usually Congress does.

6 You are supposed to be able to rely on your
7 regulatory agency to do the right thing on the
8 recommendation of the accident investigators, but in
9 this case Congress had -- until Congress acted, nothing
10 was happening.

11 So at the end -- one way of making this vivid is
12 that at the end of this big meeting, the NTSB meeting
13 in April of 2014, the head of the National
14 Transportation Safety Board, who was a very respected
15 safety professional, the chairman was -- was Deborah
16 Hersman -- she basically said to the regulators, "You
17 folks have a -- you have a tombstone mentality. Until
18 you have got bodies piled up on the ground, you are not
19 going to do anything."

20 And she was so disheartened by the railroad's
21 intransigence at not making crude oil trains safer that
22 the day after her big forum, which was a really
23 important forum in terms of what came out, the day
24 after her forum, she resigned from public service --
25 after 20 years of public service she resigned.

1 So basically I am just trying to suggest that the
2 notion that we have regulatory agencies that are
3 dominated by the industry they are supposed to regulate
4 is not exactly a way out kind of a notion.

5 I mean Ms. Hersman herself was -- has been
6 fighting for 10 years to get the railroad, the Federal
7 Railroad Administration to do the right thing, and it
8 has just been -- it has just been mostly fruitless.
9 They just -- they can get ignored by the regulators.

10 Q. Okay, thank you.

11 MR. JOYCE: I have no further questions.

12 THE COURT: Any further direct examination
13 from anyone on the defense?

14 Mr. Goldsmith?

15 MR. GOLDSMITH: Thank you, your honor.

16 * * * * *

17 D I R E C T E X A M I N A T I O N

18 BY MR. GOLDSMITH:

19 Q. I am going to show you, Mr. Millar, what has been
20 admitted as defendant's exhibit B.

21 Do you see that exhibit, sir --

22 A. Yes.

23 Q. -- and have it in your hand?

24 A. I have seen it, yes.

25 Q. Do you see the train in that particular exhibit at the

1 top of the picture?

2 A. Yes.

3 Q. Does that train have oil cars on it?

4 A. Well it looks like a unit train of railcars, and the
5 only way you can tell what it is actually hauling is to
6 look at the records.

7 Q. Right.

8 A. Is to be able to see the placards, but it certainly
9 could be.

10 Q. Are those cars -- are those cars oil cars?

11 A. We can't tell from this except by looking at the
12 placards.

13 Q. I see.

14 A. We can't see the placards in that picture, I don't
15 think.

16 Q. Well let me ask you this: Are the cars behind the
17 engine, do they look like oil type cars?

18 A. Sure.

19 MR. STURDIVANT: Your honor, this has been
20 asked and answered.

21 THE COURT: Overruled.

22 Q. They look like oil cars?

23 A. They look like it, yeah.

24 Q. Okay.

25 A. So --

1 Q. Thank you.

2 MR. GOLDSMITH: Nothing further.

3 THE COURT: Any further direct examination
4 from the defense?

5 MS. McCALLUM: No, your honor.

6 Mr. Mazza?

7 * * * * *

8 D I R E C T E X A M I N A T I O N

9 BY MR. MAZZA:

10 Q. Mr. Millar, are you aware of a position taken by the
11 Washington State Firefighters Association regarding oil
12 trains?

13 A. You know, I probably have read that at some point, but
14 I -- I have read lots of state firefighters
15 association's' things, so I am not -- I am not clearly
16 focused on that one.

17 Q. In terms of what you are aware of, positions being
18 taken by state firefighters associations on oil trains,
19 what are some examples of positions they have been
20 taking, beyond what you have already related?

21 A. Well the fire service is very worried about crude oil
22 trains, and in fact probably the best way of
23 encapsulating this is to say that at that National
24 Transportation Safety Board meeting with the top
25 experts from the industry and the government, the fire

1 chiefs who were invited to testify as experts for the
2 International Fire Chiefs Association, and from their
3 own experience with crude oil trains, the fire chiefs
4 were unanimous.

5 "We cannot handle these kinds of accidents. We
6 cannot handle in any way a serious accident with a unit
7 train of crude oil."

8 And so no local community is ready. And that's
9 just been their message.

10 Now the way they -- the way they emphasize that is
11 to refer to the federal guidance document on the
12 subject, which is called the "DOT Emergency Response
13 Guidebook," and that is the orange book that
14 firefighters have in their back pockets because it
15 tells you what the hazards are of all of the chemicals.

16 And in guide number 128 in the orange book, it
17 says if just one tank car of crude oil, or other
18 flammables in this category, if just one tank car is
19 involved in a fire, the fire service is supposed to
20 move back a half-mile and watch it burn.

21 In other words, don't endanger firefighters' lives
22 in a flammable situation with a -- with a flammable
23 tank car.

24 And so -- and that is just one. And what we have
25 got is hundreds -- 100 car trains where -- where

1 naturally -- I mean one -- one positive thing to say is
2 we have not lost a single firefighter in all of the
3 accidents that we have had in the United States, and
4 that is because they all have backed off. They have
5 not gone and done, quote, "offensive firefighting."
6 They have done defensive firefighting.

7 They all back off and we haven't lost a single
8 one.

9 Now that just -- that testifies to how seriously
10 the fire service takes this advice in the DOT Emergency
11 Response Guidebook.

12 Q. What do you mean by defensive firefighting?

13 A. Defensive firefighting means you -- you evacuate
14 anybody who is close by and might be in danger, but
15 you -- you don't go in and try and offensively fight
16 this fire.

17 We have a lot of misleading media articles, I must
18 say, around the country these days where industry has
19 sponsored some local training session on crude oil
20 trains, and they simulate a crude oil train burning,
21 and they usually have one or two cars that simulate a
22 burning --

23 MR. STURDIVANT: Your honor, I am going to --

24 A. -- and then they go in --

25 MR. STURDIVANT: Nonresponsive.

1 MR. MILLAR: I am --

2 THE COURT: I am going to overrule the
3 objection.

4 Please finish your answer.

5 A. And the -- and the picture the next day in the
6 newspaper is a picture of firefighters training a hose,
7 either with water or with foam, on a burning crude oil
8 tank car fire -- simulated.

9 That has never happened. That has never happened,
10 and it will never happen if the firefighters follow the
11 advice in their own guidebook.

12 So that is -- that is propaganda that is being put
13 out there by the industry and by the local governments
14 to say, "Oh, yeah, we are getting prepared. We are
15 training our firefighters."

16 No firefighter would ever admit that that is the
17 thing that they are going to do is go and -- go up next
18 to a tank car and let -- you know, and to pretend to be
19 putting it out.

20 Q. (By Mr. Mazza) So once a -- once an oil train fire is
21 started, is it safe to say it is going -- it is going
22 to be allowed to burn until it burns itself out?

23 MR. STURDIVANT: Objection, leading.

24 MR. MAZZA. Oh, let me restate the question.

25 THE COURT: All right.

1 Q. (By Mr. Mazza) If a -- if an oil train fire happens,
2 what will the firefighters do?

3 A. Well if the firefighters know what they are dealing
4 with, they won't even get close to it in the first
5 place; they will just look at it through binoculars and
6 so forth -- if there's a fire in a crude oil train --
7 or even just one car on a crude oil train.

8 And if -- and what they will try to do is scope
9 out the situation, and as the orange book tells them to
10 do, bring out anybody who is in immediate danger -- if
11 it is next to a home or next to a residence or
12 something -- or next to a business or something -- but
13 otherwise, yeah, they will let it burn.

14 Q. So if a -- if a fire, an oil train fire broke out in a
15 tunnel such as we have under Everett or Seattle, what
16 would be the implications of that?

17 MR. STURDIVANT: Objection, calls for
18 speculation.

19 MR. MAZZA. Well, I am asking for -- for
20 an -- I don't think this is -- this is speculative, I
21 think it is -- I am asking for --

22 THE COURT: Sir, is this within your
23 expertise?

24 MR. MILLAR: No, I have never seen any --

25 THE COURT: The objection is sustained.

1 MR. MAZZA. Okay, I'm done with my questions.

2 THE COURT: Thank you.

3 Anything else from the defense?

4 MR. GOLDSMITH: No, your honor.

5 THE COURT: Cross-examination?

6 MR. STURDIVANT: No, your honor.

7 THE COURT: Thank you, sir. You may step
8 down.

9 (Brief Pause in Proceedings)

10 THE COURT: Are there any other defense
11 witnesses available today?

12 MR. GOLDSMITH: No, your honor. I regret
13 that our next two witnesses can't make it until
14 tomorrow morning.

15 THE COURT: All right.

16 Ladies and gentlemen of the jury, we will recess
17 for the day a little bit earlier than I expected.

18 We should not have any problem getting the two
19 witnesses in tomorrow, so I will instruct you again,
20 don't discuss the case amongst yourselves or with
21 anyone else. Don't seek out any information on the
22 media and please disclose to my court staff if you
23 become exposed to any information you know you
24 shouldn't.

25 And if you are communicated with in any way

1 inappropriately, trying to influence you as a juror,
2 notify authorities or a member of my staff tomorrow
3 morning.

4 All rise for the jury.

5 (The jury leaves the courtroom)

6 THE COURT: Everyone can be seated, please.

7 The jury is out of the courtroom, so I anticipate
8 that we will be done with testimony tomorrow morning?

9 MR. GOLDSMITH: Yes, your honor.

10 THE COURT: And --

11 MR. GOLDSMITH: Unless the state has rebuttal
12 witnesses.

13 THE COURT: And do you anticipate that at
14 this point?

15 MR. STURDIVANT: No, your honor.

16 THE COURT: And so I would guess that we will
17 have the big argument over jury instructions tomorrow,
18 so counsel, please be prepared.

19 If you have any briefing on the subject matter, in
20 addition to what we have already discussed, you can
21 submit that.

22 Anything else before we recess for the day?

23 MR. STURDIVANT: Nothing from the state, your
24 honor.

25 THE COURT: Anything from the defense?

1 MR. GOLDSMITH: Nothing from the defense.

2 THE COURT: All right, please return -- you
3 said 9 o'clock tomorrow?

4 MR. GOLDSMITH: Actually, they are both
5 scheduled to be here at 8:30, hopefully.

6 THE COURT: We will do it at 9 o'clock
7 tomorrow just because it takes time for folks to get in
8 through security, so I will plan on beginning testimony
9 as close to 9 o'clock tomorrow morning as we can.

10 We will see you tomorrow.

11 MR. GOLDSMITH: Thank you.

12 MR. STURDIVANT: Thank you.

13 THE CLERK: All rise, the court is in recess.

14 (End of proceedings for 1/13/2016)

15 CERTIFICATE

16 I certify that the foregoing is a correct transcript
17 from the electronic sound recording of the proceedings in
18 the above-entitled matter.

19 /Brian J. Killgore/ April 12, 2016

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APPENDIX E

January 24, June 5 & June 6, 2017 Verbatim Report of Proceedings,
Washington v. Ward (Skagit Co. Sup. Ct., Wash., No. 16-1-01001- 5)

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

State of Washington,)	Skagit County Cause
)	No. 16-1-01001-5
Plaintiff,)	
)	Court of Appeals
vs.)	No. 770446-1
)	
)	
Kenneth Ward,)	
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE MICHAEL E. RICKERT

Department II
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES:

For the Plaintiff: **SLOAN JOHNSON**, Senior Deputy
Prosecuting Attorney
Skagit County Prosecuting Attorney
605 South Third - Courthouse Annex
Mount Vernon, WA 98273

For the Defendant: **RALPH HURVITZ**
Attorney at Law
P.O. Box 25642
Seattle, WA 98165

ALSO APPEARING: Deputy Wade Wilhonen

DATES: January 24, June 5 and 6, 2017

REPORTED BY: **JENNIFER CHRISTINE POLLINO**,
RPR, WA CCR #2221, CA CCR #10176
OFFICIAL REPORTER

I N D E X**State's Witnesses:**

	Direct	Cross	Redirect	Recross
Wade Wilhonen	38	54		
	Voir Dire	51		

Patrick Davis	59	65		
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Justin Odens	72	76		
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Todd Woodard	80			
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Defense Witnesses:

Kenneth Ward	87			
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1 **MOUNT VERNON, WASHINGTON**

2 **JANUARY 24, 2017**

3 **1:30 P.M.**

4 *** * ***

5
6 THE COURT: State v. Ward, 16-1-01001-5.

7 MR. JOHNSON: Thank you, Your Honor.

8 THE COURT: I see this came on today. I see it was
9 assigned to me. Lucky me. Now Judge Needy said a couple issues
10 have already been dealt with some constitutional issues and that;
11 is that correct?

12 MR. HURVITZ: That is correct. Last week we appeared
13 before Judge Needy, and the motion brought by the defense at that
14 time was to dismiss Counts II and II based on constitutional
15 vagueness and overbreadth.

16 THE COURT: When you say (indistinguishable) is that the
17 conspiracy itself?

18 MR. HURVITZ: Right. At that point on the State's motion
19 that count was dismissed. I'm hoping by the time of trial the
20 counts will be re-numbered so we have I, II and III.

21 THE COURT: Yeah, that's no problem.

22 MR. HURVITZ: Judge Needy -- just for the record, my
23 name is Ralph Hurvitz. I represent Mr. Ward, who is standing to
24 my left.

25 Judge Needy determined at the motion in limine that the

1 State was going to bring would properly be heard by the trial
2 judge in the case.

3 THE COURT: That's a necessity issue?

4 MR. HURVITZ: Correct. For that reason he directed us to
5 seek pre-assignment.

6 THE COURT: Got it, okay. Yeah, I wondered how that came
7 to be. We can live with all of that.

8 MR. HURVITZ: One preliminary matter.

9 THE COURT: When is this set for trial?

10 MR. HURVITZ: It's set for trial this coming Monday. But
11 based on my weekly check-ins with the clerk's office I've been
12 told that understandably in-custody cases get priority over out
13 of custody. And also understandably within the universe of the
14 out-of-custody cases those with closer expiration dates for trial
15 cases get priority. Totally understood. What the clerk told me,
16 and I have a weekly Thursday check in with the clerk as of this
17 past Thursday, is that there were 23 criminal cases on the trial
18 calendar. And I have no way to predict, you know, how close we
19 will be to availability.

20 THE COURT: I'll predict you are pretty close. It's rare
21 that we ever have to bump a criminal case; although, we are down
22 a judge next week. Judge Svaren will be at judicial college. It
23 could happen, but we will know by Thursday afternoon, Friday
24 morning at the latest.

25 MR. HURVITZ: What the clerk said is we will get our

1 directive Thursday afternoon at the call of the calendar.

2 THE COURT: I think I have the calendar this Thursday
3 too; so I'll be there. We can get an answer pretty quick. Okay.
4 How many days do you think this will go, if it did go to trial?

5 MR. HURVITZ: I, again, guessing, three.

6 What do you think?

7 MR. JOHNSON: Depends in part on how this motion goes
8 today.

9 THE COURT: Yeah, I understand that I see there's seven
10 or eight witnesses that are contingent.

11 MR. HURVITZ: Your Honor, I noted in my response to Mr.
12 Johnson's motion we're not intending to call seven, but with the
13 uncertainty of the scheduling we will have maybe three or four
14 only but not seven certainly.

15 THE COURT: Okay.

16 MR. HURVITZ: One preliminary matter, Your Honor. There
17 is a videographer, Lindsey Goodwin-Grayzel, who is here. And
18 before proceeding -- with her proceeding with the recording of
19 this proceeding we wanted to get Your Honor's approval that it's
20 permissible.

21 THE COURT: Fine, yeah.

22 MR. HURVITZ: Okay. Thank you.

23 MR. JOHNSON: I would note an objection for the record
24 that Ms. Goodwin-Grayzel was a co-defendant and is still
25 theoretically potentially a co-defendant, as it was dismissed

1 without prejudice.

2 THE COURT: Judge Needy told me that during his hearing
3 there was a video camera there too. I mean I'm not a big fan of
4 cameras in the courtroom. I've seen them clutter things up and
5 cause headaches over the years on appeal in the few cases we've
6 done. But I understand the need and nature for open access so.

7 MR. HURVITZ: Thank you, Your Honor.

8 It's Mr. Johnson's motion.

9 MR. JOHNSON: We are here on my motion, Your Honor. I
10 did provide some additional briefing after receiving Mr.
11 Hurvitz's briefing.

12 THE COURT: Yeah, I saw them.

13 MR. JOHNSON: You've had a chance to look at them?

14 THE COURT: Yes.

15 MR. JOHNSON: What the State's general argument is is the
16 necessity defense is a narrowly used common law defense, and
17 under the facts of this case it just simply doesn't apply. It's
18 not designed for this type of case. It's not designed for a
19 global issue or even a wide social issue. It's designed for the
20 type of case where an individual or a group of individuals is
21 placed in imminent jeopardy of some sort of harm and someone has
22 to take an action immediately to stop that harm from happening.
23 And it may be that the action they take would otherwise violate a
24 law to stop someone from killing another person, for example,
25 would be an example.

1 And what I was trying to convey in the briefing is there
2 are some statutory requirements. They are few and far between
3 because this is not a widely used defense. But a major point, a
4 major holding that comes from the State v. Parker case and the
5 Harper case that's a federal case, there's no direct causal
6 relationship between the action taken in this case. The State's
7 allegations are Burglary and Sabotage, shutting off a valve and
8 the harm threatened, which is global warming. We're talking
9 about a single action in our little tiny county on one single
10 pipeline.

11 When global warming, without getting into alternative facts
12 of what our current administration would maybe even deny is
13 happening at all, but back in October it was still on the table
14 as something that was happening. But it's happening everywhere
15 if it's happening. And what's happening in China, or Russia, or
16 on the east coast, we don't know. What was happening in Skagit
17 County was a pipeline was bringing some oil to the refinery and
18 that got shut off momentarily. That doesn't stop global warming.
19 That's not a necessity. It doesn't make sense. It leads to
20 absurd results and possibly frightening results. Just because
21 someone believes in a cause, has tried to get something put into
22 place before, but because of the political climate, the social
23 climate, it just hasn't given them the results they want does not
24 excuse breaking the law.

25 For those and a number of reasons I think allowing this --

1 we're already being recorded. This is all part of a show. This
2 is all part of Mr. Ward's agenda to get the word out about global
3 warming; that it is an evil; that oil is bad. This will all be
4 included in the movie that's being made by Ms. Grayzel. To allow
5 this trial, criminal trial, to become an argument about global
6 warming and its effects, or to allow lengthy discussion of civil
7 disobedience and what does it mean and how effective is it that
8 defeats the purpose of a criminal trial.

9 What we are here on is to decide on October 11th what
10 happened. What happened? Was the law broken? And what are we
11 going to do about it? Those all might be interesting mitigating
12 factors after a trial if there is a conviction. If there isn't
13 it's a moot point. But it's not helpful to the jurors. All it
14 can do is confuse the issue. It's a broader issue than a typical
15 necessity, and the State's position is that it's irrelevant. And
16 we cite ER 401, as well as 403, as well as the case law in the
17 briefing.

18 THE COURT: Okay. Thank you, Mr. Johnson.

19 Hurvitz, go ahead.

20 MR. HURVITZ: Thank you, Your Honor.

21 Your Honor, I think the analysis here will both begin and
22 end with the Washington pattern jury instruction 18.02. I know
23 that Mr. Johnson has some opinions as to what the necessity
24 defense is for. His opinion and my opinion aren't what count
25 here. The jury instructions, I would suggest, reflects the State

1 of the law in Washington, and that's where it will begin. There
2 are four prongs to that necessity defense. And by virtue of the
3 fact that it's an affirmative defense, the defense has the burden
4 to prove by a preponderance of the evidence each prong of that
5 defense.

6 THE COURT: You said 18.02?

7 MR. HURVITZ: 18.02 of the pattern instructions, Your
8 Honor.

9 THE COURT: Let me look at it while you are speaking.

10 MR. HURVITZ: Do you want me to wait?

11 THE COURT: Yeah, just a second.

12 Go ahead.

13 MR. HURVITZ: Thank you, Your Honor.

14 We embrace our burden to prove each prong of that necessity
15 defense by a preponderance of the evidence. When Mr. Johnson says
16 there was a crime committed on October 11th that's the nature of
17 any affirmative defense, Your Honor. An affirmative defense by
18 it's very nature says yes, there was a crime committed, but there
19 was a justification. So we're not disputing that there may well
20 have been by the elements of the now three charged offenses in
21 the information, the charging document. If we were disputing
22 those elements of each of those three charges we wouldn't be in a
23 position to proceed with an affirmative defense. So on that issue
24 there's not an argument with Mr. Johnson.

25 A couple of points that he made, however, I think misstate

1 the law as set forth in instruction 18.02. The first prong is
2 that Mr. Ward reasonably believed that the commission of the
3 charged offenses was necessary to avoid or minimize a harm. And
4 in conjunction with that second is the harm sought to be avoided
5 was greater than the harm resulting from the violations of the
6 law as charged.

7 Mr. Johnson suggests that there's another element caused
8 immediacy to this. And I would suggest that if the drafters of
9 the pattern instructions had recognized that there was a
10 requirement that the harm to be avoided was an immediate harm we
11 would have seen that in the words of the instruction and the
12 language of the instruction. They are not there.

13 In a certain sense, Your Honor, the harm, depending on what
14 timeframe one person would consider as constituting immediacy, is
15 for debate. Are we suggesting that there's a toggle switch and
16 one can shut off the input into climate destruction? No, it's
17 not a toggle switch. Are we suggesting that the effects of
18 climate destruction can be reversed in 24 hours? We're not
19 suggesting that either. So it's not that kind of immediacy.
20 It's not like the paradigmatic example of the necessity defense
21 which is a hiker is out and gets caught in a blizzard and would
22 perish but for the fact that he breaks into a cabin to get
23 shelter from the blizzard. There's no way that the situation
24 we're facing has something as black and white as that.

25 As I have indicated in the offer of proof in this brief,

1 the change in the climate is happening quickly. It's a
2 combination both of natural forces; in other words, in the layers
3 of the atmosphere, how much heat is retained. It's related to
4 things on the planet; for example, at what temperature will ice
5 in both polar regions start to melt, break off, raise the sea
6 level. There's also a human component. In other words, the use
7 of fossil fuels, the extraction of fossil fuels, the way that the
8 fossil fuels are used will put particulate and gaseous matter
9 into the air and accelerate the climate change, accelerate the
10 degradation.

11 So the question is is it immediate 24 hours? Does
12 immediate talk about maybe two weeks, a couple years? I don't
13 think there's any specific definition. What the experts will
14 testify to is that in recent times, especially, the temperature
15 of the earth has been increasing. We'll have testimony to show
16 the rise in sea level, testimony about the status of the polar
17 icecaps and what that will do, testimony about arable land and
18 how it will be affected and all of the ramifications from that.

19 Mr. Johnson is suggesting that because it wasn't immediate,
20 in other words because a person was not about to parish in
21 several hours because of a blizzard, for example, that the
22 necessity defense is not available. I would disagree. If there
23 were something in the instructions to suggest that it wouldn't be
24 available if it weren't absolutely immediate the instruction
25 would have said so. I don't think there's any suggestion that the

1 third prong would be met. No one, including Mr. Johnson is
2 suggesting that Mr. Ward was the cause of climate change.

3 And on the fourth prong no reasonable alternative existed.
4 This case more than most others I think we've seen where the
5 necessity defense has been proposed meets that fourth prong. We
6 have here a defendant who has worked in the environmental
7 movement now for close to four decades. It's not that there are
8 things he could have tried, which there are. But there are also
9 a long list, as I set forth in the brief, of things that he
10 actually did try. And some of them were -- well, some of them
11 just didn't work for whatever reason, and that could be true with
12 regard to legislative lobbying or proposals of bills to lobbying
13 administrative committees, to public education. He's tried a
14 significant number of avenues.

15 But the question there, as well as on the first prong is
16 that he reasonably believed that the commission of the offense
17 was necessary to prevent a greater harm, is it quite frankly is a
18 jury question. It's up to a jury to assess the testimony from
19 Mr. Ward from the experts that testify at trial and to determine
20 reasonableness. Reasonableness is more than just availability, as
21 I indicated in the brief. And it's a question for the jury to
22 determine. It's a fact question.

23 What I would like to do, Your Honor, is if the Court has
24 any question I would be happy to address them. But frankly I
25 think the four prongs we've made certainly a prima fascia

1 showing, which is all that we are required here.

2 Secondly, if the jury is instructed -- if the testimony is
3 permitted and then the jury is instructed, if the jury determines
4 that we have not established each of the four prongs of the
5 necessity defense by a preponderance of the evidence it's within
6 the province of the jury to reject the defense, in which case
7 they will convict Mr. Ward. However, the case law suggests that
8 the jury has to be given the opportunity to weigh the evidence.
9 And if the Court were to rule as a matter of law that it couldn't
10 be presented there's very little left. The thrust here is that
11 given the factual aspect of the events it's a question of fact
12 for a jury as are all questions of fact. And the jury should be
13 in the position to make that determination.

14 THE COURT: Thank you.

15 Mr. Johnson, anything further?

16 MR. JOHNSON: Yes, Your Honor, that's not actually the
17 case. If you look at the cases cited, first of all, the harm was
18 not avoided. We still have this issue going on, was not avoided
19 by his actions. And this is exactly like the unlawful possession
20 of firearm cases, where a couple of the different cases that were
21 cited involved people who said well, I had no choice but to carry
22 a gun because somebody had it in for me, and I needed to protect
23 myself. That's where we get into the judge made the decision no
24 you are not getting that defense, and that defense was affirmed
25 by the higher court. That decision by the judge was affirmed by

1 the higher courts. Because they said look you didn't avoid the
2 harm. There was no causal connection between what you did and
3 this threatened harm. There's no linkage there. There's no
4 linkage here.

5 The issue with the prima fascia, even the WPIC, which taken
6 on its own without interpretation of case law, which I think you
7 do have to look at case law to interpret WPICs, no reasonable
8 legal alternative. Well, counsel himself said sure there were
9 things that were available, that were reasonable. But he also did
10 some and tried them, and they didn't work. Well, no reasonable
11 alternative means no choices, none. There was nothing left to
12 do. And admittedly there were many more things you could do.
13 Whether they would be successful, I don't know. Was this
14 successful? Arguably not. We still have the same problems that
15 we had.

16 So I don't think it is necessary to hear a treatise on
17 global warming to justify these actions. This does not fit.
18 This is not what that defense is for. That determination can be
19 made here and now, and it can be affirmed by a higher court. I
20 don't think that is the concern. In the interest of efficiency,
21 and jury confusion, and just the legality of this, and the
22 precedent it might set it leads to absurd results. And this
23 motion should not carry.

24 THE COURT: Alright. Thank you. Well, when I read your
25 briefs wherein you propose the necessity defense I had not had a

1 chance to read it, Mr. Hurvitz. But I immediately liked you
2 because that is one novel approach to life and to the necessity
3 defense. I was trying to think about how many times I've seen the
4 necessity defense instruction actually given in the 25 years up
5 here, and I couldn't think of a case. I've seen it proposed a
6 couple of times. And, as Mr. Johnson points out, and as you are
7 probably aware, it's usually proposed in a situation where
8 there's some sort of immediate harm. An individual is in the
9 back of a car bleeding out and the guy is driving like a maniac
10 and the individual tells the policeman, his defense is I had to
11 get to the hospital. I had to elude. If I didn't my friend
12 would be dead, something like that. In this context it takes a
13 second to kind of wrap your head around it because it is such a
14 novel approach to utilize or request a necessity defense, 18.2 in
15 the WPIC, as a defense to these particular crimes based on global
16 warning. I mean it certainly fits the necessity to take it to a
17 logical extreme. It certainly fits as a necessity defense if not
18 for the fact that Mr. Ward turned off that valve it was going to
19 explode and destroy the town of Burlington or injure somebody, if
20 that valve wasn't turned off. I think that's how most people
21 conceptualize a necessity defense. So that being the point, Mr.
22 Johnson kind of opines that in order to use it there needs to be
23 kind of an immediate and imminent harm to an individual and his
24 property that's coming. And if I didn't break the particular law
25 that I'm charged with that harm would have been substantial and

1 would have happened.

2 Your point is nowhere in the 18.02 does it say it has to be
3 imminent or immediate, but I believe that's the point. Although
4 it doesn't exactly say it in the 18.02. I believe your point is
5 between the law as it does need to have some immediacy, some
6 evidence more so than this particular threatened harm, which is
7 climatic change, global warming, whatever. I don't know what
8 everybody's beliefs are on that. But I know there's tremendous
9 controversy over the fact whether it even exists and even if
10 people believe that it does or doesn't, the extent of what we are
11 doing to ourselves, our climate, and our planet. There's great
12 controversy over our political leaders. A person may feel
13 hamstrung and bound because there's no reasonable legal
14 alternative because the voting process didn't work. Someone I
15 guess could surmise they need to take action into their own hands
16 and break the law in order to fix a mighty wrong being
17 perpetrated by one of our leaders somewhere. I know the logical
18 extreme is utilizing this defense. In a situation like this
19 would be, I think would be some crazy results. And I don't think
20 it lines up on any of the four corners, let alone one or two of
21 the corners that would be necessary to give this particular WPIC.

22 But the biggest problem or the two biggest problems in
23 using it here is the turning of that valve in the general scheme
24 of climactic change would be, I don't know if you could
25 mathematically quantify it, but it would have to be so

1 astronomically small that the turning of any particular valve on
2 any particular oil field is going to change the disaster to our
3 environment and would be incalculable; it would be so
4 infinitesimal and so small. So the actual harm to be avoided is
5 not avoided at all. All that happens is a valve is turned and the
6 problem being, because it's worldwide, maybe galaxy wide, it
7 continues on. That's one big problem.

8 I think the biggest problem is the defense being given the
9 fourth prong and that there is no reasonable legal alternative in
10 existence. I read your brief. I understand Mr. Ward has been at
11 this for four decades, and I applaud that; that's tremendous.
12 And that he's worked diligently and hard. He would be what you
13 would call a frontline soldier. The problem is just because the
14 alternatives haven't worked for him doesn't mean there still
15 aren't legal alternatives out there.

16 MR. HURVITZ: Well, as I indicated in the brief, Your
17 Honor, we do have experts on that particular issue who would
18 testify about why other sorts of actions by people would not
19 likely be effective to address this particular problem.

20 THE COURT: Well, I saw that you had three or four
21 people, and their testimony would be the advantages or the
22 propriety for civil disobedience for things such as this. That
23 I'm not sure how you qualify such an expert, I guess. It's hard
24 to tell because it's set on each person. Nonetheless I think
25 that is subject to great debate because I'm sure that there are

1 for every person you can bring in to testify as such you could
2 bring in another person to testify that in this particular case
3 there are a lot of legal alternatives out there. In fact, there's
4 a lot of things being proposed and done that do aid and help in
5 the battle against climatic change. So I don't think just
6 because Mr. Ward's particular individual situation has been
7 successful for him is his position on this that doesn't mean
8 there aren't legal alternatives out there.

9 MR. HURVITZ: Following Your Honor's thought, Your Honor
10 suggested that Mr. Johnson could bring in experts who would
11 testify to the contrary, and he certainly could. What that says
12 to me is it's a jury question for the jury to weigh the testimony
13 of experts from both parties and to make a determination based on
14 that.

15 THE COURT: What you are asking me to do then technically
16 is bring in a jury of 12 people in a case where we announce to
17 them that the charges are Burg II, Sabotage, and I think the
18 other one is --

19 MR. JOHNSON: Criminal Trespass 2nd.

20 THE COURT: 2nd, and then commence a trial that could
21 take forever. It would be like the Scopes monkey trial. I mean
22 all the sudden that trial was the debate of whether or not a
23 divine beginning, or we all came from monkeys. That happened in
24 1926 and is still one of the most famous trials in American
25 history next to OJ Simpson. But I don't see bringing in a jury

1 for a matter of weeks to debate a Burglary case and a Sabotage
2 case, because the thing that they would have to get to is they
3 would have to come to a conclusion in order to prevail on this
4 necessity defense that, in fact, global warming is out there, and
5 global warming is harmful, and that Mr. Ward is the frontline
6 warrior and is going to take care of it. So the trial would
7 become whether or not -- the trial would focus on the existence
8 and the severity of the climatic change, and that's not what we
9 are here to do. That's not what superior court is here to do.
10 That's for the legislative arena, not for the judicial arena to
11 debate that. I don't think there's a judge in the world,
12 including Al Gore, if he were a judge, who would give the
13 necessity defense in this situation because it doesn't fit on any
14 of the four corners. So I would grant the motion in limine. This
15 is not a case for the necessity defense; although it would be
16 interesting.

17 MR. HURVITZ: I have one follow-up question to that.
18 Inferentially that would mean that the defense witnesses wouldn't
19 be permitted to testify?

20 THE COURT: Yes.

21 MR. HURVITZ: The question I have is this Mr. Ward
22 himself retains the right to testify?

23 THE COURT: Certainly, he does. And he certainly
24 reserves the right to testify to what he believes so on and so
25 forth. That's not going to be enough to back door the necessity

1 defense. Let's put it this way, he can, because I've seen this
2 happen a time or two, where the defendant does testify as to his
3 or her personal belief as to why they did what they did and the
4 jury has that in front of them, and you can argue to the jury
5 that Mr. Ward believes that if it were not for this climate
6 control would really ratchet out of shape, et cetera. That's
7 fine. The problem is you can't argue that without the supporting
8 18.02 necessity defense. But you are right, he has a right to
9 testify as to anything he wants pertaining to this case.

10 Anything else we need to deal with before we key it up?

11 MR. HURVITZ: I don't believe so.

12 MR. JOHNSON: I did just receive today a crime laboratory
13 report. I provided Mr. Hurvitz a copy involving some evidence
14 that was collected from Mr. Ward analyzed by the crime lab that
15 found to contain amphetamine. I believe that's a controlled
16 substance. I haven't had time to contemplate if this is
17 something I'm interested in charging adding to the mix at this
18 stage of the game. I don't have a lot of control when I get it
19 but --

20 THE COURT: In my humble opinion we probably have enough
21 charges.

22 MR. JOHNSON: I thought you might say that, Your Honor.
23 I'll mull it over.

24 THE COURT: Mr. Hurvitz, will you be here on Thursday
25 afternoon? It's probably a --

1 MR. HURVITZ: Right. And what I didn't know, and I'll
2 ask -- pardon my ignorance -- whether Mr. Ward needs to be
3 present on Thursday as well?

4 THE COURT: No, he's out of custody. As long as you are
5 here.

6 MR. HURVITZ: Thank you, Your Honor.

7 THE COURT: Thanks you, everybody

8
9 **(PROCEEDINGS ENDING AT THIS TIME)**
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1 **JUNE 5, 2017**

2 **9:41 A.M.**

3 *** * ***

4
5 THE COURT: Good morning, everybody. How are you doing?
6 Everybody happy to be here? Some of you are liars. Well, I'm
7 happy to be here. I'm a little nervous this morning because
8 after over 300 jury trials this is my last one; so I'm a little
9 nervous.

10 **(AUDIENCE CLAPPING)**

11 I want to thank you for coming this morning for jury
12 service. We can't do this without you folks. You are the
13 foundation and heartbeat of the justice system. People from all
14 walks of life, all parts of the County, come in and sit in on
15 jury service and administer justice for the rest of the citizens
16 of Skagit County. So thank you very much for being here. I know
17 it's an imposition. I know it's going to be about 75 degrees out
18 there. And I know you have jobs, and people, and friends, and
19 family you need to get to. So we will do our best to roll this
20 trial along and get it concluded in the timely fashion so we can
21 get you back into your world.

22 First off, let me introduce a few people. Kelli over here
23 is our bailiff, and we've been together since we were kids.

24 And Betty Murphy down here is actually with the clerk's
25 office. She'll be serving as clerk for the trial. And she'll be

1 responsible for minute notes and keeping custody and integrity of
2 any exhibits that come into play during the course of the trial.
3 We've been together since we were kids.

4 Then Jen down below, a certified court reporter, and she is
5 going to take a verbatim transcript of everything that occurs
6 during the course of the trial for posterity.

7 All right. First thing we should do, Betty, is swear in
8 the prospective jurors.

9 **(THE CLERK SWEARS IN THE BAILIFF)**

10 THE COURT: Be seated.

11 Are the parties ready in the case of State versus Kenneth
12 Ward?

13 MR. JOHNSON: The State is ready, Your Honor.

14 MS. REGAN: Defendant is ready, Your Honor.

15 THE COURT: All right. What we're going to do at this
16 point is we're going to select a jury. We're going to select 13
17 of you. 12 of you will be jurors. One of you will be an
18 alternate. It will probably take us the morning to do that
19 selection. We've got plenty of you so we should have the rest of
20 you out of here by the noon hour and so back on your way.

21 An important part of the jury process is the selection of
22 the jury because each side, each party only has one chance to get
23 a case in front of a jury. All the other stuff that you normally
24 read about is things that happen in an appellate court level
25 where there isn't a jury involved. The real justice and the real

1 rubber hitting the road in this country happens at the jury trial
2 level, and that's what you are here for. So it's very important
3 that the attorneys have an opportunity and a chance to pick
4 honest, open minded, unbiased, fair, and levelheaded jury. This
5 is the only chance they get. We need to do it right the first
6 time and the only time.

7 So the attorneys, first I'm going to ask you some
8 questions, and then the attorneys are going to ask you some
9 questions. These questions are directed to all jurors. When the
10 attorneys ask questions they may be focussed on one person. But
11 pay attention because they just may turn to the side or back of
12 the room and ask you all of the same questions that they are
13 posing.

14 Be honest, and open, candid in your answers. The attorneys
15 really need to know how you are thinking about the issues
16 involved. They really need to know whether or not you can handle
17 this particular case as a juror. All cases are different. We
18 wouldn't expect certain people to sit on certain cases. For
19 instance, if you were walking by a building yesterday and someone
20 dropped a safe on your head we would not expect you to come in
21 today and sit on a case where someone was injured because someone
22 negligently dropped something on your head. You would probably
23 have a hard time being open minded about that issue because it
24 just occurred to you. So we realize not all cases are for all
25 people. And this case may or may not be for you, and that's all

1 right because we have 72 of you.

2 This particular case is a civil case so each side can
3 excuse up to three jurors per side for a total of six. Under --
4 no, excuse me. It's a criminal case. This is a criminal case.
5 So each side can excuse up to six jurors per side with what we
6 call peremptory challenges. For those reasons the attorneys don't
7 have to give you any reason whatsoever. They can excuse you based
8 on their gut reaction. Any other excusables have to be for a
9 reason or cause. Do not feel bad if you are excused. Do not
10 feel bad if you are not on the jury. As I said, not every case
11 is for every juror.

12 Counsel, is this a one information case?

13 **(SIDEBAR CONFERENCE)**

14 THE COURT: Okay. That's what I thought. Okay. This is
15 criminal action instituted by the State of Washington. The State
16 of Washington is represented by Mr. Johnson of the Prosecutor's
17 Office.

18 Mr. Johnson, you may introduce yourself, if you would like,
19 and anybody sitting on your table.

20 MR. JOHNSON: Thank you, Your Honor.

21 Good morning, I'm Sloan Johnson with The Skagit County
22 Prosecutor's Office. Seated with me is Deputy Wade Wilhonen with
23 the Skagit County Sheriff's Office.

24 THE COURT: Mr. Ward is represented by Mr. Hurvitz and
25 Ms. Regan. You may introduce yourself and your client.

1 MS. REGAN: Good morning. My name is Lauren Regan. I'm
2 an attorney with the Civil Liberties Defense Center. My client
3 is Ken Ward and my co-counsel is Ralph Hurvitz.

4 THE COURT: All right. Mr. Ward, as he sits before you,
5 has been charged with Burglary in the 2nd Degree and Count II,
6 Criminal Sabotage. Mr. Ward has entered a not guilty plea to both
7 of those particular charges. In our state and our county a person
8 is informed they've been charged of a crime or with a crime when
9 the prosecuting attorney in a particular county files a document
10 entitled a criminal information. That document or criminal
11 information is merely a piece of paper informing a citizen that
12 they are being charged with a crime.

13 You as jurors are not to consider the fact that Mr. Ward is
14 charged with any crime as to whether or not anything did or
15 didn't occur. If that were the case all we would have to do is
16 have the government file a piece of paper charging somebody and
17 that would be the end of the story. But we have a jury system so
18 that is not the end of the story. So you're not to consider the
19 fact that a person is officially charged by the Prosecutor in
20 drawing conclusions or presumptions as to that. A person is
21 presumed innocent in this country. Mr. Ward is presumed
22 innocent. That presumption of innocence is a basic foundation of
23 our justice system also. And that presumption of innocence
24 continues throughout the entire trial, until or unless it is
25 overcome by what we call proof beyond a reasonable doubt after

1 all of the evidence is heard by the jury. So you're to assume
2 nothing at this point. Mr. Ward is presumed innocent, and we are
3 starting from scratch, and that's the way the system works. We'll
4 define reasonable doubt for the jurors who remain at the end of
5 the case.

6 Okay. The way a jury trial works is the jury's duty --
7 everybody has an individual duty and job. The jury's duty is to
8 listen to the evidence and determine the facts in the case and
9 determine from the facts and the evidence of the case from the
10 witnesses what did or didn't happen. You are the fact finders.
11 You seek the truth. And you seek justice within the truth. My
12 job in the jury trial is to determine what evidence you get to
13 hear. I don't have to worry about the facts in a jury trial. I
14 have you to do that for me. I worry about what evidence you get
15 to hear. And I worry about what law will guide you at the end of
16 the case.

17 The attorney's job, of course, is to present their cases.
18 So they present their cases to you. You find the facts. I
19 determine what evidence you get to hear and what the law is. At
20 the end of the case you take the facts as you found them and
21 combine them with the law I will give you, and deliberate with a
22 view towards reaching a just, fair, honest, open verdict.
23 Everything in court in this country is done in open court. It's
24 always open. The public is free to come and go. You will see
25 that also.

1 This is a criminal case; so that means all 12 jurors must
2 agree unanimously at the end of deliberations in order to return
3 a verdict. A civil case only 10 out of 12 jurors have to agree.
4 All right. Enough of that. I'm going to ask you a few questions
5 now. Then I'm going to turn it over to the attorneys, and they
6 can ask you their much more detailed --

7 MR. JOHNSON Your Honor, may we approach briefly?

8 THE COURT: You sure can. Come on up.

9 **(SIDEBAR CONFERENCE)**

10 THE COURT: Okay. Counsel, do you have a witness list
11 again, Mr. Johnson? If you could pass that up. I'm going to
12 ask you some questions. Do you have a witness list?

13 The trial is probably going to take us, what do you think,
14 counsel, two, two and a half days, maybe, for testimony?

15 MS. REGAN: Yes.

16 THE COURT: In the general scheme of Superior Court
17 trials this is not going to be a lengthy, lengthy trial. It's
18 probably going to take us two to three days with testimony, then
19 with deliberation time we're hopeful we can have this case
20 completed by, all said and done, by the end of business on
21 Thursday or so.

22 **(JURY SELECTION BEGINS, A PANEL OF 13 IS SELECTED AND IS SWORN IN**
23 **TO HEAR THE CASE)**

24 THE COURT: Okay. I'm going to cut you loose for the
25 lunch hour. When you come back we'll go through a little bird's

1 eye view of what we're going to be doing the next couple of days
2 and we'll get right into the case.

3 What I'm going to ask you to do over the lunch hour is not
4 discuss the fact that you are on the jury, not talk with anybody
5 about being on this jury. You can account for your time
6 obviously if someone asks you, you know, your spouse, or business
7 partner if they ask you what you are doing, you can tell them you
8 are on the jury. I ask you to not disclose even the nature of
9 the case because everybody has an opinion on everything. We want
10 to keep your minds open and unaffected so you can just hear the
11 facts in this case. Don't discuss the case over the lunch hour,
12 and we will see you back at 1:30. When you come back Kelli will
13 show you where to go. You may be excused. Kelli will give you a
14 little instruction on how to get in and out of the jury room
15 through the women's bathroom. It's a little tacky, but it saves
16 us a lot of money on a remodel. We just punch a hole in the
17 wall.

18 **(THE NOON BREAK IS TAKEN)**

19 THE COURT: Well, we need to find the jury. That's our
20 first order of business. Find the jury.

21 **(THE JURY IS NOW PRESENT, AND THE COURT EXPLAINS THE PROCESS)**

22 THE COURT: With that I will give the floor to Mr.
23 Johnson. Mr. Johnson will give you his opening statement on
24 behalf of the State of Washington.

25 MR. JOHNSON: Thank you, Your Honor.

1 Good afternoon. The evidence in this case is going to show
2 that Mr. Ward committed two crimes, Burglary in the 2nd Degree
3 and Criminal Sabotaging. First you will hear from Deputy Wilhonen
4 regarding the events of October 11, 2016. And Deputy Wilhonen
5 will tell you how he came to be involved and called to a Kinder
6 Morgan site on Peterson Road in Burlington and his contact with
7 Mr. Ward. And interestingly in this case Mr. Ward was live
8 streaming his activities that day; so you will see a video of
9 exactly what Mr. Ward was doing that day.

10 The State's position is the evidence shows that this
11 constitutes a burglary because he entered property, a building, a
12 defined building, all of these things will be defined at the end.
13 He unlawfully entered with the intent to commit the crime of
14 criminal sabotage. When he entered the facility with the bolt
15 cutter, cut the locks off, he went in and turned, cut the locks
16 off a valve, two different valves, turned one valve and closed
17 it, and then applied his own new chain and lock to it. And
18 shortly thereafter Deputy Wilhonen made contact with him, had
19 some discussion with him, and placed him under arrest.

20 You will hear from Kinder Morgan employees, and they will
21 describe to you what exactly that facility does, what that
22 company does. They are in the business of transporting oil.
23 They run an oil pipeline into the United States. And that
24 Burlington substation is an area where there are valves that
25 control the flow to, in this case, our local refinery in

1 Anacortes March's Point. They will talk to you about their
2 protocol, what impact this had on them, and what they had to do
3 as a result of Mr. Ward's actions.

4 You will then hear from the two Kinder Morgan employees,
5 Patrick Davis and Justin Odens. You will then hear from Todd
6 Woodard who lives next door, adjacent to the Kinder Morgan
7 property and his observations on October 11th. And you will hear
8 about what he observed, what he felt about it, that he reported
9 it, called it in. And just his concerns about the impact of Mr.
10 Ward's actions.

11 The State's case is relatively straightforward. It won't
12 take a long time. It's on video. The State just asks that you
13 view the evidence, apply the law that will be given to you by the
14 judge in the form of jury instructions. And when you do we'll
15 ask you to find Mr. Ward guilty of Burglary in the 2nd Degree and
16 Criminal Sabotaging. Thank you.

17 THE COURT: Thank you, Mr. Johnson.

18 Ladies and Gentlemen, Ms. Regan.

19 MS. REGAN: Good afternoon, Ladies and Gentlemen, Your
20 Honor. On behalf of Mr. Ward, our client, I want to thank you
21 for your jury service. As the judge mentioned this is a chance
22 for us to give you a little overview of what we think the issues
23 of this case are for your consideration.

24 Let me start off by giving you a little quote I think sets
25 the tone for the defense in this case. There was gentleman named

1 Edmond Burke back in the 1700's. He was an Irishman he supported
2 the American colonialists when they were fighting British
3 taxation. He said the only thing for the triumph of evil is for
4 good men to be nice.

5 In these days you only have to turn on the TV for a couple
6 of minutes to know that climate change or global warming is one
7 of the most pressing issues of our time, both politically,
8 economically, air, water, everything that human life needs to
9 continue is tied up in these powerful words. It is also true for
10 future generations. During voir dire we talked a lot about kids
11 and grand kids, future generations. But those generations are
12 going to judge us based on what we do today to take reasonable
13 steps and reasonable precautions to protect their future, protect
14 their ability to have kids that will be able to swim in the
15 rivers, to fish in our Washington coast.

16 Never has there been a time in history where the
17 ineffectiveness of government has been so threatening to life on
18 this planet. The fact that President Trump has withdrawn us from
19 the Paris Climate Accord is not just a political bombshell but
20 now it's us and Syria that only two countries on the planet that
21 are no longer part of this minimal agreement, the agreement that
22 most scientists say wouldn't even be there to protect us in the
23 long run, that baby step toward trying to ensure a liveable
24 future he walked away from that for our country right now. So
25 it's pretty clear that even the government institutions we may

1 have once relied on or believed in are on shady grounds at this
2 point.

3 This particular administration also sort of made it clear
4 that they think corporate profit, the money that goes into the
5 rich fat cat's pockets are more important than our human health,
6 and our communities, and our neighbors, and our children.

7 This case is about Ken Ward's careful, deliberate,
8 thoughtful, educated decision to take action when the government,
9 and politicians, and scientists, and others either could not or
10 would not take reasonable steps to prevent the threat of harm as
11 a result of human caused climate change, also known as carbon
12 emissions, what is the cause of global warming, which is pretty
13 undisputed are impacting the climate negatively. His intent was
14 to prevent harm, to prevent suffering from now and future
15 generations.

16 And as Mr. Johnson mentioned, unlike many cases you've
17 probably seen on TV or you have heard about in real life, Mr.
18 Ward and four other people on October 11th, 2016 walked up to the
19 five pipelines that entered into United States, Washington,
20 Montana, Minnesota, and North Dakota, walked up to the place
21 where they come up across the borders of Canada. They have gone
22 all the way from the Alberta tar sands in pipes through the
23 border, and this is where they pop up in the US. And at each
24 location one of these people would cut a padlock after
25 researching the heck out of how to do this, cut a padlock, and

1 they turned a safety valve, that stopped the entire flow of tar
2 sands coming into the United States that day. This was a method
3 that originated with some Canadians on the other side of the
4 boarder who simply jumped the fence, turned a valve, and stopped
5 the corporate process from continuing the way they have.

6 Their actions demonstrated that people do have power to
7 protect themselves even from corporate greed; that we're not
8 helpless. We are not helpless from those who would clearly place
9 their enormous wealth above that of the health of children and
10 our communities, people who feed themselves off of the bounty of
11 the ocean, who are (indistinguishable) El Nino up in here that is
12 affecting the shellfish off the coast of Washington. It is
13 ensuring that trout and wild fires all of the other things that
14 you've heard about that are causing more and more troubles in our
15 world are coming in as a result of climate catastrophes.

16 Now, Mr. Ward and his four other cohorts may not be what
17 you might typically imagine as climate activists. All of them
18 were over 50. They all had careers. One was a tribal lawyer.
19 Another was a computer programmer for the State of Oregon.
20 Another was a family counselor. Another was a website designer.
21 Then Mr. Ward spent most of his life working in the environmental
22 realm. In fact, you could say he was raised at the bosom of the
23 environmental movement. His father was one of the first
24 environmental professors in the country, an environmental lawyer
25 himself. So he grew up learning about this.

1 You are going to hear from him. We are going to put him on
2 the stand. As the Judge mentioned the defendant normally doesn't
3 take the stand in his own case. Mr. Ward wants to tell you his
4 story. How did he get to the place on October 11th that he was
5 cutting the chain on a safety valve at Kinder Morgan Pipeline,
6 after spending over 30 years working above ground, not getting
7 arrested.

8 So all of those folks have got kids. Mr. Ward will tell
9 you he's got a teenager, 17 years old. Many of the other people
10 who did these actions have grand kids, children of their own. And
11 you will hear that they are smart. They were engaged in their
12 community. They had gotten to the point where they felt they had
13 tried every feasible legal tactic in order to try to make a
14 difference. That these people, just like us, like your neighbors,
15 like the other professionals you know in your community had
16 gotten to the point where they were risking jail. They were
17 risking arrest in order to try to make a difference, in order to
18 try to change the status quo of what was going on in our country.
19 One small step toward fighting climate change. One small step in
20 recognizing the power of the people.

21 This case is also going to be very different from any you
22 have heard or seen on TV, because Mr. Ward's intent was not to
23 steal from anybody. It wasn't to break something or hurt
24 someone. His intent again was to prevent harm. His intent was
25 to help people and be accountable to his teenage son, to be

1 accountable to his community, his fellow human beings. It was to
2 stop the damage caused by a corporation that is not accountable
3 to anyone except for its corporate shareholders, whose only
4 purpose is to put profit in their bank accounts.

5 So to be accountable to we the people he and the four
6 others videotaped what they were doing. They weren't trying to
7 hide anything. In fact, they used live stream so that everyone
8 could see what they were doing as they were doing it. Before
9 they did it they made phone calls to the pipeline companies and
10 said we're going to do this in 15 minutes, please shut down this
11 pipeline. And in every single instance the pipeline companies
12 shut themselves down. It wasn't a turning of the safety valve
13 that stopped the flow of tar sands oil it was that each one of
14 these corporations had a way to stop the flow. So they did
15 everything they could to ensure that this was done in a safe way.

16 You are also going to hear that, as Mr. Johnson mentioned,
17 that this was a Kinder Morgan Incorporated facility. Kinder
18 Morgan Incorporated is a US energy transport company
19 headquartered in Houston, Texas. In fact, Kinder and Morgan, the
20 two guys who started the company used to work for Enron. You
21 might remember Enron, one of the biggest scandals our country
22 dealt with.

23 Their core business is move fossil fuel such as coal, oil,
24 natural gas, and increasingly this tar sands oil, which is also
25 known as diluted bitumen. It's like the consistency of molasses.

1 It looks like black cookie dough. It's weird. The only place it
2 comes from is Alberta, Canada in the tar sands. It is a form of
3 oil that is extracted out of the sands, as you heard some of your
4 fellow jurors talk about this morning. It doesn't go through
5 pipes real well so they have to add a bunch of chemicals to it
6 and heat it up to make that sludge push through those hundreds of
7 thousands of miles of pipeline.

8 Kinder Morgan is the 84th largest company in the world, and
9 it's the fourth largest energy company in the United States. It
10 owns and operates approximately 80,000 miles of pipeline and
11 makes about --

12 MR. JOHNSON: Your Honor, I'm going to object at this
13 point. This seems to be more testimony than expected evidence.

14 THE COURT: Yeah, to a certain degree, sustained.

15 MS. REGAN: You will also hear Mr. Ward testify that they
16 make about \$94 billion.

17 So Mr. Ward stopped the Kinder Morgan Trans Mountain
18 Pipeline. This takes tar sands from Canada to the refineries in
19 Whatcom and Skagit County. You will hear it's 716 miles long,
20 and this oil gets loaded onto ships and taken off to China.
21 So you will also hear that it was Kinder Morgan that shut down
22 their own pipeline that day. And unfortunately it was later
23 started back up, a few hours later, no damage to the pipeline.
24 They cut the locks, turned the valve back on, and the oil began
25 to flow again. No damage done, except, of course, the damage

1 that continues to happen to the climate. And for that Mr. Ward
2 has been charged with Felony Burglary and Felony Sabotage.
3 Sometimes good people can no longer stand by and simply do
4 nothing. If your neighbor's house is on fire is it right to
5 simply stand by and watch it burn without trying to help? Mr.
6 Ward will tell you it's our planet and every living thing is
7 burning up due to global warming. Then what will it take for
8 you, for me, for our government to no longer simply stand by and
9 watch it be destroyed for mere money earned by a few rich people.

10 At the end of this case we will be asking you, a jury of
11 Mr. Ward's peers, to return a verdict of not guilty as to the
12 charges of burglary and sabotaging, thank you.

13 THE COURT: Thank you, Ms. Regan.

14 Mr. Johnson, you may call your first witness.

15 MR. JOHNSON: Thank you, Your Honor, the State calls
16 Deputy Wade Wilhonen.

17
18 **WADE WILHONEN,**

19 having been first duly sworn,

20 testified as follows,

21
22 **DIRECT EXAMINATION**

23 BY MR. JOHNSON:

24 **Q.** Good afternoon, deputy.

25 **A.** Good afternoon.

1 **Q.** For the record would you please state your name, spell your
2 last name.

3 **A.** My name is Wade Wilhonen, W-I-L-H-O-N-E-N.

4 **Q.** With whom are you employed?

5 **A.** Skagit County Sheriff's Office.

6 **Q.** How long have you been with them?

7 **A.** Over 16 years.

8 **Q.** What are your duties there?

9 **A.** I'm a patrol deputy.

10 **Q.** Were you on duty on October 11th, 2016?

11 **A.** Yes, I was.

12 **Q.** Did you come into contact with anyone in the courtroom on
13 that date?

14 **A.** Yes, I did.

15 **Q.** Could you identify that person?

16 **A.** Mr. Ward wearing a gray, red tie, gray blazer, white shirt.

17 **Q.** Thank you. How did you come into contact with Mr. Ward?

18 **A.** My dispatch originally received a call stating that there
19 was going to be an incident at Kinder Morgan Pipeline off
20 Peterson Road.

21 **Q.** What did you do?

22 **A.** I started driving that direction. While I was en route I
23 called the employee that had called my dispatch.

24 **Q.** What was that conversation?

25 **A.** I just was trying to get more information on what was

1 happening. He advised me that they received a call that
2 their pipeline was going to be shut down. And this was the
3 only exposed area that was in our jurisdiction.

4 **Q.** That was the Peterson Road location?

5 **A.** Yes.

6 **Q.** I'm going to show you Exhibit 2 here. Do you recognize that
7 exhibit?

8 **A.** Yes, I do.

9 **Q.** What does that show?

10 **A.** This shows Peterson Road running from this side
11 (indicating). Here's the Bay Hill Fire Department. This is
12 the Kinder Morgan Pipeline.

13 **Q.** This is in the State of Washington?

14 **A.** Yes, it is.

15 **Q.** Is that a fair and accurate representation of the area?

16 **A.** Yes, it is.

17 MR. JOHNSON: Move to admit Exhibit 2.

18 MS. REGAN: No objection.

19 MR. HURVITZ: No objection.

20 THE COURT: Be admitted.

21 **(EXHIBIT NO. 2 IS ADMITTED)**

22 BY MR. JOHNSON:

23 **Q.** So you headed towards the location. You arrived there. How
24 did you approach the location?

25 **A.** I was coming west on Peterson Road, and I turned. There is

1 a gate right there (indicating), right behind the fire
2 department. So I entered right here (indicating). Then I
3 had to stop right there.

4 **Q.** What did you do when you stopped?

5 **A.** I was advised by the employee that there was a gate that was
6 locked. I had a small set of bolt cutters, and it did not
7 work on the lock. And I asked -- I went to the fire
8 department here and asked them. And they were able to get
9 their big pair of bolt cutters, cut the chain.

10 **Q.** So you got in through that gate and then where did you go?

11 **A.** Right down here (indicating) there's another gate at the
12 entrance right here. I parked right in front of it.

13 **Q.** What did you observe when you got there?

14 **A.** As I got onto the access road here I could see there's one
15 individual here and another one that ends up being two
16 people on the outside of the fence standing back in this
17 location.

18 **Q.** Okay. Could you describe the Kinder Morgan location? How is
19 it -- what is the layout of it?

20 **A.** It's hard to see, but there's a fence. It's all gated all
21 along here (indicating). There's a chain link fence that
22 goes all the way around. There's a main entry point right
23 here (indicating). There's another access gate on this
24 corner (indicating). And then these are the pipelines, the
25 raised area, I'm assuming, is the containment area if

1 something was to happen.

2 Q. Is the facility secured?

3 A. Yes, the gates are chain locked.

4 Q. And so you arrived and did you contact the person inside the
5 gate?

6 A. Yes. When I arrived the individual came over. And he was
7 on the inside, and I was on the outside of the gate, and I
8 started to speak with him.

9 Q. Okay.

10 MR. JOHNSON: At this time I would like to enter
11 Exhibit 1. I believe we have an agreed stipulation. That would
12 be the abbreviated video of the contact.

13 MR. HURVITZ: That's correct.

14 THE COURT: All right.

15 **(THE VIDEO IS PLAYED AT THIS TIME AND REPORTED STENOGRAPHICALLY**
16 **TO THE BEST OF MY ABILITY:)**

17 DEPUTY WILHONEN: Hello.

18 MR. WARD: Hello.

19 DEPUTY WILHONEN: Are you with Kinder Morgan?

20 MR. WARD: I am not.

21 DEPUTY WILHONEN: Who are you with?

22 MR. WARD: Myself, Ken Ward.

23 DEPUTY WILHONEN: Okay. How did you get in here,
24 climb the fence?

25 MR. WARD: Cut a lock on the other end over

1 there.

2 DEPUTY WILHONEN: Okay. Right now you are under
3 arrest for trespassing.

4 MR. WARD: Okay.

5 DEPUTY WILHONEN: I want to make sure you
6 understand that.

7 MR. WARD: What would you like for me to do?

8 DEPUTY WILHONEN: Where is the lock that you cut?

9 MR. WARD: There's a gate on the other end of the
10 berm, and I cut that lock on that gate. Do you want me to come out
11 and come over here, as I'm happy to do.

12 DEPUTY WILHONEN: Why did you do it?

13 MR. WARD: To shut down the valve here and stop
14 the pipeline.

15 DEPUTY WILHONEN: Okay. As an activist?

16 MR. WARD: Yes.

17 DEPUTY WILHONEN: I'll come over there.

18 MR. WARD: Okay. There are -- I'm the only
19 person here. There are two people over there who are following me
20 with a video camera, media type.

21 DEPUTY WILHONEN: Is that your
22 (indistinguishable)?

23 MR. WARD: That's my (indistinguishable) and the
24 flowers.

25 DEPUTY WILHONEN: Did you turn the

1 (indistinguishable)?

2 MR. WARD: I did turn the (indistinguishable).

3 DEPUTY WILHONEN: You don't know what you did?

4 MR. WARD: It's a block valve

5 (indistinguishable).

6 DEPUTY WILHONEN: I'm assuming one of those cars
7 over there is yours?

8 MR. WARD: Yes, the Jeep is mine.

9 DEPUTY WILHONEN: You guys need to leave. You
10 are on private property. You don't have permission to be on this
11 property. So now is your chance to go back. If not you will be
12 arrested also. Do you have any ID on you?

13 MR. WARD: Yes, I do. Do you want it now?

14 DEPUTY WILHONEN: Nope when we get back.

15 MR. WARD: Okay.

16 BY MR. JOHNSON:

17 Q. Does that accurately depict your contact with Mr. Ward?

18 A. Yes, it does.

19 Q. You were pointing out a valve that had the shiny chain on
20 it?

21 A. Yes.

22 Q. That was the one he indicated he had put on?

23 A. Yes.

24 Q. You talked about vehicles. I'm going to put Exhibit 2 back
25 up. If you could show again where you were contacting him

1 where the vehicles were.

2 **A.** Right here (indicating) is the gate I pulled up to. We
3 walked around. This is (indicating) the corner that he had
4 walked and then walked back. His vehicle is parked down
5 here off of Bay Ridge Drive, the pavement, and he walked
6 across there.

7 **Q.** So the video we saw of him walking was walking from that
8 area?

9 **A.** From this area right here (indicating) where he parked
10 across that corner.

11 **Q.** You placed Mr. Ward under arrest at that time?

12 **A.** Yes, I did.

13 **Q.** What did you do after he was placed under arrest? Did you
14 have contact with anyone else?

15 **A.** Yes, after I had seated him in the rear of my car an
16 employee of Kinder Morgan had arrived on the scene.

17 **Q.** What did you do with the employee?

18 **A.** He unlocked the gate so I could enter back in right here
19 (indicating). Then I went and collected the tool bag, the
20 bolt cutter, the chain, the chain that he cut, the lock he
21 cut, and the items, and also photographed the areas.

22 **Q.** I'm going to show you Exhibit 3. Do you recognize that
23 exhibit?

24 **A.** Yes, I do.

25 **Q.** What is it?

1 **A.** It's a picture of the valve he turned where he set the
2 flowers on it and also the chain he put on. And the cut
3 lock is laying there also, the old chain.

4 **Q.** Is that an accurate depiction?

5 **A.** Yes, it is.

6 MR. JOHNSON: Move to admit Exhibit 3.

7 THE COURT: Any objection?

8 MR. HURVITZ: No objection.

9 THE COURT: 3 will be admitted.

10 **(EXHIBIT NO. 3 IS ADMITTED)**

11 BY MR. JOHNSON:

12 **Q.** I'm going to show you Exhibit 4. Do you recognize that?

13 **A.** Yes, I do.

14 **Q.** What is it?

15 **A.** It's another valve that has the lock cut and the chain and
16 the lock is laying below it.

17 **Q.** Okay. Is that an accurate depiction of it?

18 **A.** Yes, it is.

19 **Q.** Move to admit Exhibit 4.

20 THE COURT: Any objection?

21 MR. HURVITZ: No objection.

22 THE COURT: Be admitted.

23 **(EXHIBIT NO. 4 IS ADMITTED)**

24 BY MR. JOHNSON:

25 **Q.** Here is Exhibit 5. Do you recognize that?

1 **A.** Yes, I do.

2 **Q.** What is it?

3 **A.** It is the gate where he entered, and he cut the link to
4 enter the gate on the southwest corner of the facility.

5 **Q.** Is that an accurate depiction of that?

6 **A.** Yes, it is.

7 MR. JOHNSON: Move to admit Exhibit 5.

8 THE COURT: Any objection?

9 MR. HURVITZ: No objection.

10 THE COURT: No objection it will be admitted.

11 **(EXHIBIT NO. 5 IS ADMITTED)**

12 BY MR. JOHNSON:

13 **Q.** Showing you Exhibit 6. Do you recognize that?

14 **A.** Yes, I do.

15 **Q.** What is it?

16 **A.** This is the cut link of chain that was next to the gate or
17 cut off of Exhibit 5's chain.

18 **Q.** Is that an accurate depiction?

19 **A.** Yes, it is.

20 MR. JOHNSON: Move to admit Exhibit 6.

21 MR. HURVITZ: No objection.

22 THE COURT: Be admitted.

23 **(EXHIBIT NO. 6 IS ADMITTED)**

24 BY MR. JOHNSON:

25 **Q.** Showing you Exhibit 7. Do you recognize that?

1 **A.** Yes, I do.

2 **Q.** What is it?

3 **A.** This is a warning hazard area sign private property sign
4 that's posted on the fence on the site.

5 **Q.** Is that a photo that you took?

6 **A.** Yes, it is.

7 **Q.** Is that an accurate depiction?

8 **A.** Yes, it is.

9 MR. JOHNSON: Move to admit Exhibit 7.

10 MR. HURVITZ: No objection.

11 THE COURT: Be admitted.

12 **(EXHIBIT NO. 7 IS ADMITTED)**

13 BY MR. JOHNSON:

14 **Q.** Here is Exhibit 8. Do you recognize that?

15 **A.** Yes, I do.

16 **Q.** What is it.

17 **A.** This is a picture looking back west from where the vehicles
18 were parked from where we -- from where the facility was
19 entered.

20 **Q.** So looking across the field there?

21 **A.** Yeah, from the facility back towards Bay Ridge Drive.

22 **Q.** Is that an accurate depiction of what you observed?

23 **A.** Yes, it is.

24 MR. JOHNSON: Move to admit Exhibit 8.

25 MR. HURVITZ: No objection.

1 THE COURT: Be admitted.

2 (EXHIBIT NO. 8 IS ADMITTED)

3 BY MR. JOHNSON:

4 Q. Showing you what's been marked Exhibit 9. These may be in a
5 different state at this point. Do you recognize that exhibit?
6 You can open it.

7 A. Yes, I do.

8 Q. What are they?

9 A. They are the flowers that were placed on the valve, the same
10 as number 3.

11 Q. Those were collected by you?

12 A. Yes, they were.

13 MR. JOHNSON: Move to admit Exhibit 9.

14 MR. HURVITZ: He opened it, right?

15 MR. JOHNSON: He looked in there.

16 MR. HURVITZ: All right.

17 MR. JOHNSON: There's still some yellow.

18 THE COURT: Be admitted.

19 (EXHIBIT NO. 9 IS ADMITTED)

20 BY MR. JOHNSON:

21 Q. Showing you Exhibit 10. Do you recognize that exhibit?

22 A. Yes, I do.

23 Q. What is it?

24 A. These are the bolt cutters that were used to cut the locks
25 and the chain.

1 Q. Those were collected by you?

2 A. Yes, they were.

3 MR. JOHNSON: Move to admit Exhibit 10.

4 MR. HURVITZ: No objection.

5 THE COURT: Be admitted.

6 (EXHIBIT NO. 10 IS ADMITTED)

7 MR. JOHNSON: Couple more.

8 BY MR. JOHNSON:

9 Q. Showing you Exhibit 11. Do you recognize that exhibit?

10 A. Yes, I do.

11 Q. What is it?

12 A. It is the Hefty tool bag that he carried on to the site.

13 Q. That was collected by you?

14 A. Yes, it was.

15 MR. JOHNSON: Move to admit Exhibit 11.

16 MR. HURVITZ: No objection.

17 THE COURT: Be admitted.

18 (EXHIBIT NO. 11 IS ADMITTED)

19 BY MR. JOHNSON:

20 Q. Showing you Exhibit 12. Do you recognize that?

21 A. Yes, I do.

22 Q. What is it?

23 A. It is the tin hat that he was wearing when I contacted him.

24 Q. That was collected by you as well?

25 A. Yes, it was.

1 MR. JOHNSON: Move to admit Exhibit 12.

2 THE WITNESS: Metal hard hat.

3 MR. HURVITZ: With the understanding that it may not be
4 tin, no objection.

5 THE COURT: Be admitted.

6 **(EXHIBIT NO. 12 IS ADMITTED)**

7 BY MR. JOHNSON:

8 Q. Showing you Exhibit 13. Do you recognize that exhibit?

9 A. Yes, I do.

10 Q. What is it?

11 A. This is a black lock that was collected from the site that
12 had been cut.

13 Q. That was collected by you?

14 A. Yes, it was.

15 MR. JOHNSON: Move to admit Exhibit 13.

16 MR. HURVITZ: Quick voir dire?

17

18 **VOIR DIRE EXAMINATION**

19 BY MR. HURVITZ:

20 Q. Where on the site was that collected?

21 A. I believe this one was the one that was collected that was
22 shown in photograph 4.

23 MR. HURVITZ: No objection.

24 THE COURT: Be admitted. What number was that again?

25 THE WITNESS: 13.

1 THE COURT: 13.

2 (EXHIBIT NO. 13 IS ADMITTED)

3 BY MR. JOHNSON:

4 Q. Here is Exhibit 14. Do you recognize that exhibit?

5 A. Yes, I do.

6 Q. What is it?

7 A. It is another cut padlock from the site.

8 Q. For Mr. Hurvitz's benefit do you remember where that one was
9 from?

10 A. Yes, this is the one that was cut from the valve that he
11 turned as depicted in Exhibit 3.

12 MR. JOHNSON: Move to admit Exhibit 14.

13 MR. HURVITZ: Question, Exhibit 3 is the one where
14 flowers were?

15 THE WITNESS: Yes, the one with the flowers.

16 MR. HURVITZ: Got it. No objection.

17 THE COURT: Be admitted.

18 (EXHIBIT NO. 14 IS ADMITTED)

19 BY MR. JOHNSON:

20 Q. Here is Exhibit 15. Do you recognize that exhibit?

21 A. Yes, I do.

22 Q. What is it that?

23 A. That is a padlock that I cut.

24 Q. Where was that from?

25 A. This was the padlock he placed on the valve that he turned

1 as depicted in Exhibit 3.

2 MR. JOHNSON: Move to admit Exhibit 15.

3 MR. HURVITZ: No objection.

4 THE COURT: Be admitted.

5 **(EXHIBIT NO. 15 IS ADMITTED)**

6 BY MR. JOHNSON:

7 Q. Exhibit 16, do you recognize that?

8 A. Yes, I do.

9 Q. What is it?

10 A. This is the half of the chain link that I could find from
11 when he entered the facility. I did not locate the other
12 half of this.

13 Q. That's depicted in photograph?

14 A. Exhibit No. 6, this link.

15 MR. JOHNSON: Number 6. Thank you. Move to admit
16 Exhibit 16.

17 MR. HURVITZ: No objection.

18 THE COURT: Be admitted.

19 **(EXHIBIT NO. 16 IS ADMITTED)**

20 BY MR. JOHNSON:

21 Q. Finally we have Exhibit 17. Do you recognize that?

22 A. Yes, I do. This is the chain that was placed on the valve,
23 and that I took after cutting the lock.

24 Q. That was the valve with the flowers on it?

25 A. Yes, depicted in Exhibit 3.

1 MR. JOHNSON: Move to admit 17.

2 MR. HURVITZ: No objection.

3 THE COURT: Be admitted.

4 **(EXHIBIT NO. 17 IS ADMITTED)**

5 MR. JOHNSON: Nothing further at this time for this
6 witness, Your Honor.

7 THE COURT: Cross exam?

8 MR. HURVITZ: Thank you, Your Honor.

9

10 **CROSS EXAMINATION**

11 BY MR. HURVITZ:

12 Q. Good afternoon nice to see you again.

13 A. Nice to see you.

14 Q. So your interaction with this event began when you were
15 advised that dispatch had received a telephone call,
16 correct?

17 A. Yes.

18 Q. The telephone call said that someone was going to close the
19 valve at Kinder Morgan?

20 A. Yes.

21 Q. Going to suggest that it hadn't happened yet, correct; that
22 it was going to be later, in the future?

23 A. They just received a call so I was going that way; so I
24 didn't know.

25 Q. Right. But they said not that someone had closed the valve

1 but someone was going to?

2 **A.** Yes, that's information I had.

3 **Q.** Okay. You've been with Skagit County Sheriff now you said
4 16 years?

5 **A.** Yes.

6 **Q.** And you have investigated a number of burglary cases, I
7 assume?

8 **A.** Yes, I have.

9 **Q.** About how many?

10 **A.** I couldn't give you an estimate. I would have to look.

11 **Q.** An estimate is fine. I'm not looking for exact numbers.

12 **A.** Hundreds.

13 **Q.** Okay. Hundreds of burglary cases. Is it typical or atypical
14 that before a burglary happens the perpetrator calls ahead
15 or has someone else call ahead and say it's going to happen
16 in ten minutes?

17 **A.** I would say atypical.

18 **Q.** Atypical. So you arrived at the scene, and you met Mr.
19 Ward?

20 **A.** Yes, I did.

21 **Q.** He didn't try to hide from you, did he?

22 **A.** No, he did not.

23 **Q.** He interacted with you in a very civil way as shown in the
24 video?

25 **A.** Yes.

1 **Q.** He was respectful?

2 **A.** Yes.

3 **Q.** He answered your questions?

4 **A.** Yes.

5 **Q.** He identified himself?

6 **A.** Yes.

7 **Q.** He indicated he was an activist?

8 **A.** Yes.

9 **Q.** He indicated that he was there for the purpose of shutting
10 off the valve, the block valve?

11 **A.** Yes.

12 **Q.** Very open about it?

13 **A.** Yes.

14 **Q.** Didn't try to deceive you?

15 **A.** Nope.

16 **Q.** So then you had to climb over something in that video. What
17 were you climbing over?

18 **A.** There were three strands of barbed wire basically. Like
19 walk past and they put three strands of barbed wire just to
20 close it up between the fence and the fence going around the
21 property.

22 **Q.** You had to get up over that?

23 **A.** Yes.

24 **Q.** And from the video I think I heard Mr. Ward just make sure
25 you are okay when you were getting kind of stuck on the --

1 **A.** I stepped on the top one, and it broke.

2 **Q.** He was concerned about your wellbeing?

3 **A.** Yeah, he asked if I was okay.

4 **Q.** You wanted to know how he got in?

5 **A.** Yes.

6 **Q.** He brought you right over to the gate where he had cut the
7 lock or the chain?

8 **A.** Yes.

9 **Q.** So he was very helpful in showing you how he got in?

10 **A.** Yes.

11 **Q.** He told you exactly what he did to close the blocked valve?

12 **A.** Yes.

13 **Q.** In the other burglary cases you've investigated is it
14 typical or atypical that the person who commits the burglary
15 takes you around the location of the burglary and just
16 basically is a tour guide, shows you exactly where he was,
17 what he did, where he did it. Is that typical or atypical?

18 **A.** Atypical.

19 **Q.** And finally we have here Exhibit No. 9, the sunflowers?

20 **A.** Yes.

21 **Q.** Admittedly these you picked up in October of this past year,
22 correct, October 11th?

23 **A.** Yeah, 2016.

24 **Q.** Right, 2016. So that would be eight months ago?

25 **A.** Yes.

1 **Q.** The flowers looked a lot fresher and more appealing eight
2 months ago than what you are going to find in Exhibit 9 in
3 the bag, right? So the picture of the flowers is a more
4 accurate depiction of the flowers that Mr. Ward, in fact,
5 left than what we have eight months later?

6 **A.** Yes.

7 **Q.** Again, going back to the hundreds of burglaries you've
8 investigated is it typical or atypical that the person who
9 commits the burglary leaves a bunch of flowers behind at the
10 site of the burglary?

11 **A.** Atypical.

12 MR. HURVITZ: No further questions, Your Honor.

13 THE COURT: Cross exam or redirect?

14 MR. JOHNSON: Thank you, Your Honor. The State has no
15 further questions.

16 THE COURT: Thank you, Deputy Wilhonen. You may step
17 down and be excused. You may call your next witness.

18 MR. JOHNSON: Your Honor, a break might be in order. I
19 believe they are over in our office.

20 THE COURT: While procuring the next witness we'll take a
21 recess and reconvene at five minutes to 3:00.

22 **(A BREAK IS TAKEN)**

23 THE COURT: One thing, so I don't forget, I do not know
24 if the newspaper is doing an article. I can never tell whether
25 they are doing an article on any particular case or not. But

1 should they do an article tonight, do not read the article.
2 That's a procedure that we have stood by for years and years.
3 Put the newspaper aside or whatever. If you want to read it
4 after the trial, have at it. But that's part of the instruction
5 to not do any outside investigation or research on your own. So
6 don't read any newspaper articles or anything like that. Should
7 be -- I heard this morning someone mentioned there was an article
8 on NPR or something. If that comes out and you have the radio on
9 tomorrow just put in ear plugs on that particular part going on.

10 All right. You may call your next witness.

11 MR. JOHNSON: Thank you, Your Honor. The State calls
12 Patrick Davis.

13 THE COURT: All right. Mr. Davis, come forward. Raise
14 your right hand.

15
16 **PATRICK DAVIS,**

17 having been first duly sworn,
18 testified as follows,
19

20 **DIRECT EXAMINATION**

21 BY MR. Johnson:

22 **Q.** Good afternoon, Mr. Davis.

23 **A.** Good afternoon.

24 **Q.** For the record state your name and spell your last name.

25 **A.** Patrick Davis, D-A-V-I-S.

1 **Q.** With whom are you employed?

2 **A.** Kinder Morgan.

3 **Q.** What is your job there?

4 **A.** I'm the operations supervisor in Washington State for the
5 60 miles of pipeline that delivers crude to the two -- four
6 refineries.

7 **Q.** What kind of business is Kinder Morgan in?

8 **A.** We transport crude oil from Canada to the four refineries in
9 Whatcom and Skagit County.

10 **Q.** Is that done via pipeline?

11 **A.** Yes, it is. It's all pipeline.

12 **Q.** Do you recall the events at the Peterson Road Kinder Morgan
13 property on October 11th, 2016?

14 **A.** Yes.

15 **Q.** How did you become involved in that?

16 **A.** I got a call from our control center operator in Edmonton,
17 Washington. And they let me know that someone by the name
18 of Jay O'Hara had called in to say they would be closing a
19 valve, one of our main line valves in the Mount Vernon area
20 within the next 15 minutes. So after that call I called our
21 security person who informed me I should be calling 911
22 directly. And then I called my boss, who was in Burnaby to
23 let him know. Then I called 911. Then they returned my
24 call and said they were -- I had to give them an address
25 when I called 911 to say where is this. The only thing that

1 came to mind was the valve that could be seen from the
2 public, which is at the Burlington scraper trap that we call
3 it. It is behind the golf course. The officer called me
4 back to say he was in a locked gate, and to go ahead, cut
5 the lock, and go on in, and see what is going on there.
6 Because by that time there had been people in our control
7 center had it online, and this video that was being shown
8 live recognizes our facility; so I had him go in.

9 **Q.** You said Edmonton, Washington did you mean Alberta?

10 **A.** I did. Edmonton, Canada where our control center is.

11 **Q.** Exhibit 2 is on this easel there. Is that a depiction of
12 your facility on Peterson Road?

13 **A.** Yes, this little small area here, three acres. You see the
14 golf course houses there.

15 **Q.** You are familiar with that facility?

16 **A.** Yep, that's our Burlington scraper trap. It's where the
17 pipe changes diameter so we had to bring it underground.
18 There used to be a pump station there.

19 **Q.** Is that facility secured?

20 **A.** Yes, it has cyclone fence, and barbed wire on the top, and
21 it's locked. And the signage says no trespassing, private
22 property, dangers of H2S?

23 **Q.** What is H2S?

24 **A.** Hydrogen sulfite. It's in crude oil. It lays in low areas;
25 so you can't detect it unless you have a detector. It

1 doesn't give off a rotten egg smell.

2 **Q.** So it's safe to say it's not open to the public?

3 **A.** That is correct.

4 **Q.** Did Mr. Ward or anyone else have permission to be inside
5 that facility on October 11th, 2016?

6 **A.** They did not.

7 **Q.** Do they at any other time?

8 **A.** No, only Kinder Morgan personnel are supposed to be on site
9 at that facility.

10 **Q.** So after you reported this and had contact with Deputy
11 Wilhonen what did you do next?

12 **A.** At the same time that I found out about this and determined
13 that there was activity at that site I sent two individuals
14 together to go to that site. Because at the beginning they
15 said close a valve in the Mount Vernon area. So was this
16 our pipeline came to my mind because there is more than one.
17 But then once I saw the activities there I sent two people
18 to that facility.

19 **Q.** Okay. Did your company take any other action?

20 **A.** Internally we had an emergency response light call that
21 alerted everybody from Houston up to get onto an emergency
22 call line. I explained the situation to them. And they
23 responded by saying that they were interested in knowing the
24 outcome of this, and wanted to prosecute. It became
25 something that was our problem.

1 **Q.** Did they take any action with respect to the pipeline
2 itself?

3 **A.** Oh, yes. We had to shut the pipeline down immediately when
4 we had this occurrence at our facility, unauthorized entry.

5 **Q.** Let me stop you there, and just ask you why, why you would
6 have shut down?

7 **A.** Because if a valve had been closed in our pipeline it could
8 have built up pressure to the point of breaking it, or who
9 knows what, causing harm to everyone around it. It's
10 something you don't want to happen. You don't want to close
11 something, a flow of oil.

12 **Q.** At that point did you know what had happened with the
13 pipeline?

14 **A.** We knew that a valve was being turned and closed because it
15 was a live feed. So we opted to close, shut the whole
16 pipeline down, which we go in two different directions.

17 **Q.** And so after it was shut down did you have any other -- what
18 else did you do?

19 **A.** Whenever we shut the pipeline down we have a restart
20 procedure so we went out. And due to this activity of
21 activists we didn't know if they were in other parts of our
22 system. So we went to every valve site. We had some work
23 activities where the pipe was exposed. I sent people to
24 those facilities. Basically looked at every part of the
25 pipeline we could in that 60 miles prior to starting back up

1 again to know it was safe.

2 **Q.** How long before the pipeline -- the pipeline was eventually
3 restarted, correct?

4 **A.** Yeah, it was four hours later. So I was not entirely sure
5 when we restarted it, but it was four hours from the time it
6 shut down, I know.

7 **Q.** Did Mr. Ward's actions interfere with Kinder Morgan's
8 operations?

9 MR. HURVITZ: Leading.

10 THE WITNESS: Yes, it did.

11 THE COURT: Just second, sustained.

12 BY MR. JOHNSON:

13 **Q.** Based on the shutdowns what was the effect on Kinder Morgan?

14 **A.** We had to stop delivering to the refineries that we were
15 going to at the time and discontinue that service until we
16 could get it safely started back up again.

17 **Q.** And is that part of your primary service?

18 **A.** Yes, that's our only service to supply crude oil to the four
19 refineries.

20 **Q.** You are paid a wage by Kinder Morgan?

21 **A.** Yes, I am.

22 MR. JOHNSON: Nothing further for this witness. Thank
23 you.

24 THE COURT: Cross exam?

25 MR. HURVITZ: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. HURVITZ:

Q. Mr. Davis, good afternoon?

A. Good afternoon.

Q. Nice to see you again. How long have you been with Kinder Morgan?

A. 28 years.

Q. 28 years is just about the entire life of that particular company, correct?

A. That is not correct.

Q. 28 years ago would be what, 1989?

A. The pipeline was put in in 1953.

Q. But then it actually -- Kinder Morgan hadn't come into being itself at that time; isn't that correct?

A. I can't tell you exactly when Kinder Morgan was formed. They bought us ten years ago.

Q. Okay. But Kinder is Mr. Richard Kinder, correct?

A. Yes, Richard Kinder is the part of the name of Kinder Morgan.

Q. And William Morgan is the other one?

A. That is correct.

Q. You are familiar with the history of the company as you know it, right?

A. Yes.

Q. And you are familiar with Mr. Kinder, even though you may

1 not have met him in person?

2 MR. JOHNSON: Objection as to relevance in that it
3 exceeds the scope of direct.

4 THE COURT: A little leeway. Get with it.

5 MR. HURVITZ: I'll get with it, sure.

6 BY MR. HURVITZ:

7 Q. Before Mr. Kinder and Mr. Morgan owned the company Kinder
8 Morgan, Mr. Kinder was second in command at Enron, was he
9 not?

10 MR. JOHNSON: Objection as to relevance, Your Honor.

11 THE COURT: Sustained.

12 BY MR. HURVITZ:

13 Q. And Mr. Kinder and Mr. Morgan essentially bought pipelines
14 in various parts of the country from Enron?

15 MR. JOHNSON: Same objection.

16 THE WITNESS: I don't know that for a fact.

17 THE COURT: Overruled. Go ahead.

18 BY MR. HURVITZ:

19 Q. Are you familiar with catastrophic events that Kinder Morgan
20 has experienced in various locations?

21 A. Yes.

22 Q. For example, in Louisiana were you familiar with oil spills
23 into the Mississippi River there?

24 MR. JOHNSON: Objection as to relevance.

25 THE COURT: Sustained.

1 BY MR. HURVITZ:

2 Q. Houston, where apparently Mr. Kinder himself resides, where
3 pollution resulting from coal and --

4 MR. JOHNSON: Objection as to relevance.

5 THE COURT: Sustained.

6 BY MR. HURVITZ:

7 Q. And I see where -- I see what rulings I may have so I won't
8 ask you about other locations.

9 A. Thank you.

10 Q. So let's talk instead of piles of coal dust or things of
11 that nature, how about pipelines?

12 A. That would be good because that's what this is about.

13 Q. Think back to 2007, were you with Kinder Morgan at the time?

14 A. Yes, I was.

15 Q. And you're familiar with a pipeline rupture in Burnaby, BC
16 that forced the evacuation of 50 families?

17 A. Yes.

18 MR. JOHNSON: Objection as to relevance in this matter,
19 Your Honor.

20 THE COURT: Sustained.

21 MR. JOHNSON: Move to strike.

22 THE COURT: The question and answer will be stricken.

23 BY MR. HURVITZ:

24 Q. Okay. Understanding that I'm not going to be permitted to
25 inquire into particular pipeline ruptures and pipeline

1 spills, you are aware of a number of such events from Kinder
2 Morgan Pipelines, are you not?

3 MR. JOHNSON: Objection, relevance.

4 THE COURT: Sustained.

5 BY MS. REGAN:

6 Q. Are you aware of a proposed pipeline expansion between
7 Edmonton and Burnaby, British Columbia, two locations you
8 mentioned in your direct examination?

9 MR. JOHNSON: Objection as to relevance.

10 THE COURT: He may answer that.

11 THE WITNESS: Yes, I am aware of that.

12 BY MR. HURVITZ:

13 Q. Following roughly the same route as the Trans Mountain
14 Pipeline?

15 A. Roughly.

16 Q. And the new pipeline would be intended to carry about
17 590,000 barrels of tar sands per day, correct?

18 MR. JOHNSON: Objection as to relevance.

19 THE COURT: I'll sustain at this point.

20 BY MR. HURVITZ:

21 Q. Now, with regard to events of October 11, 2016 -- well
22 before I get there. You've been with Kinder Morgan for
23 28 years. Are you aware they are what's called a master
24 limited partnership?

25 A. Not quite sure what that means. Do you want to explain it?

1 **Q.** I would be glad to. That's where instead of paying
2 corporate tax the company hands the money to its
3 shareholders, and they just pay their individual taxes
4 wherever they happen to reside?

5 MR. JOHNSON: Object as to relevance, Your Honor.

6 MR. HURVITZ: Just answering his question to me, Your
7 Honor.

8 THE COURT: Go ahead.

9 BY MR. HURVITZ:

10 **Q.** So now that I've explained what that practice is are you
11 aware of it?

12 **A.** No, I did not know that.

13 **Q.** Assuming that that's how the finances function, if Kinder
14 Morgan were to spend more money on pipeline maintenance that
15 would be less that they would be able to distribute under
16 the master limited partnership to their shareholders?

17 MR. JOHNSON: Objection, Your Honor. He has indicated he
18 doesn't understand the structure.

19 THE COURT: Sustained.

20 BY MR. HURVITZ:

21 **Q.** You know that Mr. Kinder and Kenneth Lay (ph) were college
22 friends?

23 MR. JOHNSON: Objection as to relevance.

24 THE COURT: Sustained.

25 BY MR. HURVITZ:

1 **Q.** October 2016, October 11, 2016, I didn't hear anything about
2 anybody suffering physical injury as result of the valve
3 being turned; is that correct?

4 **A.** That is correct.

5 **Q.** Apart from the cutting of I believe it would be three locks,
6 one of which was cut by Detective Wilhonen -- excuse me --
7 Deputy Wilhonen, aside from that one that was one of the
8 three and there were two others, correct?

9 **A.** There was four total if you are counting, one on site and
10 one at the front gate.

11 **Q.** Okay. Four and the chain cut?

12 **A.** And a what, chain?

13 **Q.** Chain, yes.

14 **A.** Yes. Two chains, in fact.

15 **Q.** Two chains, okay. So perhaps the -- we have four locks and
16 two chains. If I were to go to Home Depot I would be in and
17 out of there for, what, \$40, 30, maybe?

18 **A.** You wouldn't have attempted to close a pipeline valve if you
19 went to Home Depot.

20 **Q.** No, but I mean the cost of the chains and locks?

21 **A.** These are expensive locks. They are 300 bucks a piece.

22 **Q.** All right. I didn't realize that. So each one of those four
23 locks is \$300 a piece?

24 **A.** They are metal locks. They are really expensive. We try to
25 maintain our security.

1 Q. Doesn't work particularly well, though, right?

2 A. It does until somebody tries to cut them. And since then we
3 have put quite heavy locks on them, they won't get through
4 this time, if you want to try again.

5 Q. Think about it. You indicated that the pipeline was shut for
6 your estimate is four hours, right?

7 A. That's not an estimate. It was shut down for four hours.

8 Q. All right, four hours. And aside from the closing for four
9 hours and the chains and locks, as nice as they may have
10 been, there was no other physical damage, was there?

11 A. There could have been.

12 Q. Well, but there wasn't, was there?

13 A. No.

14 MR. HURVITZ: No further questions, Your Honor.

15 MR. JOHNSON: Nothing further for this witness.

16 THE COURT: Thank you. You may step down.

17 MR. JOHNSON: The State calls Justin Odens.

18

19 JUSTIN ODENS,

20 having been first duly sworn,

21 testified as follows,

22

23 THE COURT: Come on up, have a seat, pull up real close
24 to the microphone.

25 /////

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Good afternoon, Mr. Odens.

A. Good afternoon.

Q. For the record would you state your name and spell your last name?

A. Justin Odens, O-D-E-N-S.

Q. With whom are you employed, sir?

A. Kinder Morgan.

Q. What does Kinder Morgan do?

A. We are a crude oil transfer pipeline.

Q. What is your position there?

A. I'm an operator.

Q. Are you paid a wage to work there?

A. I am.

Q. How long have you been with the company?

A. 11 years.

Q. Are you familiar with the facility at 16246 Peterson Road?

A. I am.

Q. Have you done work there before?

A. I have.

Q. Is that a secured facility?

A. It is.

Q. How is it secured?

A. We have a chain link fence that runs all the way around it.

1 There's two gates on it. One on the backside, and one where
2 we enter in.

3 **Q.** Are those open or locked?

4 **A.** They are locked.

5 **Q.** Were you aware that Mr. Ward or anyone else had permission
6 to be there on October 11th, 2016?

7 **A.** I was not.

8 **Q.** Do you remember the events of October 11th, 2016?

9 **A.** I do.

10 **Q.** How did you become involved?

11 **A.** I was sitting in the office, received a phone call from our
12 control center just a few minutes after 7:00, just walked in
13 the office saying somebody was going to close the main line
14 block valve in 15 minutes.

15 **Q.** Where is your office?

16 **A.** Bellingham, Washington.

17 **Q.** So what did you do when you were advised that of?

18 **A.** Talked to my supervisor who happened to be sitting right
19 there, bumped us in a snipper [ph], and I hopped in the
20 truck and headed that way.

21 **Q.** What happened when you arrived at the facility?

22 **A.** There was two officers that had went through our first gate,
23 which is right up Peterson Road. They had cut the lock off
24 to go back to our facility. They were sitting at our second
25 gate waiting to go inside the facility because there was a

1 gentleman inside our area.

2 **Q.** What did you do after that?

3 **A.** We let the officers in there.

4 **Q.** Did you inspect the mechanisms of the facility?

5 **A.** We did. There was some cut locks on two different valves
6 inside the facility.

7 **Q.** Okay. Had anything been done with the valves?

8 **A.** From what I could tell when I got there I couldn't see that
9 any valves had been moved.

10 **Q.** Were any of the valves -- did they have anything that did
11 not belong to Kinder Morgan on them?

12 **A.** Yes, there was MV 48 valve, which is a main line block valve
13 that had a different lock and chain on it than what we had
14 put on there. It was put on by somebody else with a bouquet
15 of flowers.

16 **Q.** Had that valve been manipulated in any way?

17 **A.** From what I could tell when I was there I couldn't tell it
18 had been moved in any way other than our lock and chain had
19 been cut off and replaced with another one.

20 **Q.** Do you have a protocol for operating valves at that
21 facility?

22 **A.** Yes, we do.

23 **Q.** What is your protocol?

24 **A.** We don't close my main line block valves unless we have two
25 personnel on site, a safety protocol from Kinder Morgan.

1 **Q.** What could happen if a valve is shut off randomly?

2 **A.** At any given time so there's safety features in place,
3 relief tanks if a valve is ever to be closed during pumping
4 of oil or anything like that. There's also a potential, you
5 know, the pipe -- hopefully you would never have any issues
6 or anything like that potentially you could blow a pipe by
7 closing the main line block valve if we were pumping oil.

8 **Q.** Would this pose a danger, a potential danger?

9 **A.** Most definitely.

10 MR. HURVITZ: Objection, leading.

11 THE COURT: Sustained.

12 BY MR. JOHNSON:

13 **Q.** What could happen if a main line block valve causes a surge?

14 **A.** Your pipe is designed for certain pressures. Should you
15 exceed a pressure you could blow the pipe or rupture the
16 pipe. You've got a housing development and a golf course
17 right next to that location.

18 **Q.** After you inspected the premises what was your next course
19 of action? Did you have to do anything?

20 **A.** We had to stay on site until we could lock everything back
21 up. We had to get new locks and chains. We checked out the
22 area. The back gate had been cut open. We replaced the
23 lock and chain there. We had to go through, check and make
24 sure all the valves were working properly, opening and
25 closing. Once everything was secured and we locked up we

1 went and continued on the rest of our line making sure all
2 our other vaults were in working order.

3 **Q.** Were there chains on -- how many valves had chains cut?

4 **A.** Two valves.

5 **Q.** Okay. You're familiar with both of those?

6 **A.** Yep.

7 **Q.** And are those part of the pipeline mechanism?

8 **A.** Yes.

9 **Q.** Did you have to make any adjustments to those valves?

10 **A.** We did. We had to make sure that MV 48 valve -- we had
11 closed it, then opened it back up to make sure it was in
12 fully open position before we left the site.

13 **Q.** Before you could resume operation?

14 **A.** Operation, yes.

15 MR. JOHNSON: Thank you. Nothing further.

16 THE COURT: Cross exam?

17 MR. HURVITZ: Thank you, Your Honor.

18

19 **CROSS EXAMINATION**

20 BY MR. HURVITZ:

21 **Q.** Good afternoon, Mr. Odens. Nice to see you again. So the
22 first word you got on October 11th, 2016 was that someone
23 was going to close the main line block valve in 15 minutes?

24 **A.** Yes.

25 **Q.** So something that was 15 minutes in the future?

1 **A.** Yes.

2 **Q.** Rather than somebody reporting an event that had already
3 occurred?

4 **A.** Correct.

5 **Q.** You mentioned the MV 48 main line block valve?

6 **A.** Yep.

7 **Q.** And that, even though there was a different link and chain
8 -- lock and chain on it, you couldn't tell if it had been
9 removed, correct?

10 **A.** No.

11 **Q.** And it turned out when you went to make sure you could turn
12 it back on the valve operated correctly, isn't that right,
13 the valve itself was not broken?

14 **A.** I didn't actually do it with a hand valve. I used the motor
15 operated valve to make sure it was in a fully open position.

16 **Q.** And it was?

17 **A.** We had closed it, then we opened it back up to make sure it
18 was fully open.

19 **Q.** When you were doing that you were making sure it closed and
20 opened properly, right?

21 **A.** Yes.

22 **Q.** And it did?

23 **A.** Right.

24 **Q.** The function of the valve was fine?

25 **A.** The function of the valve was fine, yes.

1 **Q.** Now, you mentioned that this location was adjacent to a
2 housing development and a golf course?

3 **A.** Yep.

4 **Q.** And that you had a safety protocol, correct?

5 **A.** Yep.

6 **Q.** That required two personnel to be present whenever any sort
7 of opening, or closing, or work on the valves was being
8 done?

9 **A.** When doing anything with a main line block valve.

10 **Q.** Anything with a main line block valve.

11 **A.** When I do, yes.

12 **Q.** Right. I'm sure the protocol applies to everybody not just
13 you?

14 **A.** I've been here 11 years, and I've never closed that valve
15 yet.

16 **Q.** So there is a protocol?

17 **A.** Correct.

18 **Q.** A safety protocol?

19 **A.** Yep.

20 **Q.** Suggesting that there is some kind of risk attending to
21 having these pipelines this close to a residential
22 neighborhood and golf course; isn't that correct?

23 **A.** Correct.

24 MR. HURVITZ: No further questions.

25 THE COURT: Anything further?

1 MR. JOHNSON: Nothing, Your Honor. Thank you.

2 THE COURT: Thank you. You may step down and be excused.

3 MR. JOHNSON: Your Honor, our final witness is not
4 available until tomorrow morning.

5 THE COURT: Okay. So it looks like, ladies and
6 gentlemen, we are going to break early today, which never breaks
7 anybody's hearts. So we will release you at this time. Do not
8 discuss the case with anyone. See you back at 9:00 tomorrow
9 morning.

10
11 **(PROCEEDINGS ENDING FOR THE DAY AT 3:27 P.M.)**
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1 JUNE 6, 2017

2 9:05 A.M.

3 * * *

4
5 MR. JOHNSON: The State calls Todd Woodard.

6
7 TODD WILLIAM WOODARD,

8 having been first duly sworn,

9 testified as follows,

10
11 THE COURT: Come on up, have a seat right there.

12
13 **DIRECT EXAMINATION**

14 BY MR. JOHNSON:

15 Q. Good morning, Mr. Woodard.

16 A. Good morning.

17 Q. For the record, would you please state your name and spell
18 your last name?

19 A. My name is Todd William Woodard, W-O-O-D-A-R-D.

20 Q. Mr. Woodard, are you familiar with the Kinder Morgan
21 Pipeline facility off Peterson Road in Skagit County?

22 A. I am.

23 Q. How are you familiar with that?

24 A. The property is located directly west of my backyard.

25 Q. And how long have you lived next to that facility?

1 **A.** I've lived there since January of 2002.

2 **Q.** Have you had contact with anyone from Kinder Morgan over the
3 time that you've lived there?

4 **A.** Yes.

5 **Q.** What kind of contacts do you have?

6 **A.** They come in and out every week, I'm assuming to do general
7 inspections. They often have other work that's done. If
8 it's more major they always let us know what's happening,
9 when, what we can expect. About once a year we get an
10 information packet. I'm assuming my other neighbors order
11 that as well with pipeline numbers, et cetera, phone
12 numbers.

13 MR. HURVITZ: Your Honor, objection. The objection was
14 assuming about other neighbors.

15 THE COURT: Sustained.

16 BY MR. JOHNSON:

17 **Q.** Without giving away too much specifics could you indicate
18 the general area of where you live?

19 **A.** (Indicating).

20 **Q.** Okay. Thank you. What do you do for a living, Mr. Woodard?

21 **A.** I'm the director of Natural Resources, Samish Indian Nation.

22 **Q.** What does your job entail?

23 **A.** Our mission statement is to protect, preserve, and enhance
24 natural resources for the protection of the Samish people
25 current future generations on the ground that means

1 everything from marine debris cleanup to water quality
2 studies, storm water work to beach river restoration
3 activities.

4 **Q.** Do you ever in that capacity work with anyone from Kinder
5 Morgan?

6 **A.** They are usually present at oil spill drills conducted by
7 the refineries, which I do participate in in Anacortes.

8 **Q.** Do you recall the events at the facility near your home on
9 October 11th of 2016?

10 **A.** I do.

11 **Q.** Could you explain what you observed that morning?

12 **A.** Sure. So the rear of my house with the bedroom and living
13 space faces out to the west to this location. As I was
14 getting ready for work I noticed a gentleman inside the
15 compound wearing a tan jacket, high vis, and hard hat.

16 **Q.** What did you do after you observed him?

17 **A.** I assumed it was one of the workers at that time. Then I
18 noticed a pair of people on the south side of the fence
19 outside the wire filming. I thought that was a little bit
20 odd. Where I got concerned was when I walked to the other
21 end of my house and noticed the access gate entering that
22 compound was still locked, closed, and there were no Kinder
23 Morgan vehicles present.

24 **Q.** Okay. So once you saw that what was your reaction?

25 **A.** At that time the gentleman was near some of the

1 infrastructure was holding a small piece of electronics in
2 his hand with an ear bud. It just seemed to be fairly odd
3 to me. I started looking for the Kinder Morgan phone number
4 and could not find it at that time. So I decided to contact
5 911.

6 **Q.** And so you had a specific number for Kinder Morgan?

7 **A.** I did.

8 **Q.** They had given that to you at some point in your living
9 there?

10 **A.** Correct.

11 **Q.** Did you ever find that number?

12 **A.** I did. After I spoke with 911 the operator who said they
13 would look further into it continued to observe activity,
14 found that number and contacted and was informed that Kinder
15 Morgan employees and sheriffs were responding.

16 **Q.** Why did you take that step? Why did you call someone?

17 **A.** I was concerned that there could be a problem at the
18 pipeline resulting in spillage of product or worse damage to
19 the property of my neighbors, our safety. I know these pipe
20 lines are managed in a certain way. If someone is doing
21 something they don't understand what they are doing it can
22 cause a problem.

23 MR. JOHNSON: Thank you. Nothing further for this
24 witness.

25 THE COURT: Cross exam?

1 MR. HURVITZ: No cross, Your Honor. Thank you.

2 THE COURT: Thank you. You may step down and be
3 excused. Thank you.

4 MR. JOHNSON: The State rests at this time, Your Honor.

5 THE COURT: Okay.

6 MS. REGAN: Your Honor, a brief matter for the Court.

7 THE COURT: Kelli, excuse the jury.

8 **(JURY NOT PRESENT)**

9 THE COURT: Be seated. All right. Go ahead.

10 MR. HURVITZ: Briefly, Your Honor, the Defense moves to
11 dismiss both counts for insufficiency of evidence. With regard to
12 Count I, the Burglary count, in order for the outdoor area to be
13 considered a building it not only needs to be a fence, but there
14 has to be evidence that the fence is uninterrupted. There is no
15 testimony in the record that the fence was continuous and
16 uninterrupted. With regard to the area that I'll call the Kinder
17 Morgan yard, and as a result there's no testimony on this
18 particular issue. There's not sufficient evidence to give Count
19 I to the jury.

20 With regard to Count II, the sabotage count, I would
21 suggest that the locks and chains are not inherent to the
22 operation of the company. And the brief interruption of service
23 is not sufficient to rise to the level of what is required in the
24 elements of the sabotaging. Thank you.

25 THE COURT: Thank you, Mr. Johnson.

1 MR. JOHNSON: Your Honor, with respect to the fence
2 there's ample evidence that it is a completely fenced. Deputy
3 Wilhonen testified to that. The Kinder Morgan employees
4 testified to that; that it is completely fenced with a chain link
5 fence, with barbed wire on top, and two locked entry areas, which
6 were both testified to. The evidence in the video shows that. The
7 evidence on the Exhibit 2 shows an entirely fenced area. The
8 video shows entry via breaking a lock. If there were an open
9 spot in the fence arguably that would be the place to go. So
10 this was a completely fenced area. It's the statutory definition
11 of a building and legal definition of a building. Burglary 2nd
12 Degree is entirely appropriate and has been shown by the
13 evidence.

14 With respect to Sabotage requirements that the locks being
15 cut there was intent, as Mr. Ward's words in the video indicated
16 to shut the valve, turn the valve with the intent of shutting it,
17 interfere with, interrupt, impair, or obstruct the owner
18 operator's control. Mr. Ward not only turned the valve he
19 removed the chain and lock and put his own chain and lock on
20 there exerting control that did result in a shutdown of the
21 operation. So certainly it interrupted the business of Kinder
22 Morgan. And the other element is unlawfully take possession or
23 control of any property instrumentality, machine, mechanism, or
24 appliance used in such business or enterprise. The valves are
25 clearly a mechanism of the Kinder Morgan enterprise. And he did

1 take control, possession. He took more control than just turning
2 it. In fact, put a lock on it and locked it to the exclusion of
3 the owner and that had to be cut off and removed by Kinder
4 Morgan.

5 There is ample evidence in the video and the testimony to
6 show and the admissions of the defendant to show that the crime
7 of sabotage had been committed and should be considered by jury.

8 THE COURT: All right. Thank you. Well, we all know the
9 standard in the State v. Erwing motion. At the conclusion of the
10 State's case you must take the evidence as presented by the State
11 in the light most favorable to the non-moving party, and the
12 non-moving party in this motion is always the government. So
13 taking the evidence in the light most favorable to the non-moving
14 party there does appear to be sufficient evidence to at least
15 allow them to go to the jury on the Burglary 2nd charge that
16 there was testimony from the deputy involving the continuity of
17 the fence, and there's a photograph of the defendant showing the
18 continuity of fence. The jury can debate that and make up their
19 own minds. There's enough evidence to at least allow them to
20 debate that issue.

21 The same with Count II, Criminal Sabotage, there's
22 certainly sufficient evidence taken in the light most favorable
23 to the non-moving party to allow the jury to at least debate the
24 issue of whether requisite control was taken by Mr. Ward over the
25 possession and ownership of Kinder Morgan.

1 So I'll deny the half-time motions. How many witnesses do
2 you all have, just Mr. Ward? And are you ready to go on that?

3 MS. REGAN: Yes.

4 THE COURT: Okay. Good.

5 Okay Kel.

6 **(JURY NOW PRESENT)**

7 All right. The State has rested, ladies and gentlemen.
8 Mr. Hurvitz, Ms. Regan, you can present any witnesses you intend
9 to call.

10 MS. REGAN: Thank you, Your Honor. The Defense will call
11 Ken Ward to the stand.

12 THE COURT: All right. Mr. Ward, come forward, raise
13 your right hand.

14

15 **KENNETH WARD,**

16 having been first duly sworn,

17 testified as follows,

18

19 THE COURT: Come on up have a seat, sir.

20

21 **DIRECT EXAMINATION**

22 BY MS. REGAN:

23 **Q.** Good morning, Mr. Ward. Why don't we start off this morning
24 by why don't you provide the jury with some basic
25 information about who you are. Can you tell us your name,

1 your age, who lives in your home?

2 **A.** My name is Kenneth Ward, spelled, W-A-R-D. Everybody calls
3 me Ken, except for my mom. I live in Corbett, Oregon for the
4 last four years. Before that I lived in several places on
5 the east coast.

6 **Q.** How old are you?

7 **A.** I am 60.

8 **Q.** Describe your family for us.

9 **A.** I have a former wife, Angelina Leo [ph], with whom I have a
10 son, Elijah, who is 17. My sweetheart is Laura Barley [ph],
11 who is a family doctor in a clinic outside of Portland. My
12 family, I grew up Rhode Island. Both my parents are retired
13 and live in Rhode Island. My mom is a former professor of
14 higher education and now retired. And my dad is a former
15 professor of chemistry and a founder of the Urban
16 Environmental Laboratory at Brown University.

17 **Q.** Your dad, does he have any degrees other than chemistry?

18 **A.** He also has a law degree that he doesn't use.

19 **Q.** Can you give us a brief rundown of your education?

20 **A.** I graduated from public schools in Providence, Rhode Island.
21 I'm a graduate of Hampshire College in Western
22 Massachusetts. And I studied for a year at the Andover
23 Newton Theological School in Newton, Massachusetts.

24 **Q.** Okay. Could you give us little run down of your employment
25 and professional experience?

1 **A.** Yes. Actually before graduation from college I took leave
2 of absence from school to work for the State Department of
3 Environmental Equality Engineering in Newton, Massachusetts
4 working on an air pollution issue.

5 Then after graduation from college I became the first
6 executive director of an organization called Rhode Island
7 Public Interest Research Group, State PIRG, which is part of
8 a national network of consumer and environmental protection
9 groups that was inspired by Ralph Nader. I worked there for
10 a couple of years.

11 Then I moved to New Jersey where I was the executive
12 director of the New Jersey Public Interest Research Group,
13 in Jersey PIRG, which is one of the larger of the state
14 organizations. We had, by the time I left, roughly 50 staff
15 people working in five offices in the state. We worked on a
16 rang of consumer protection issues, banking reform,
17 insurance, as well as environmental issues, like typically
18 toxics and air pollution in the State of New Jersey, which
19 was big concern.

20 For about half the time that I was there I also served
21 in national capacity within the network of the state PIRGS.
22 I was responsible for our environmental litigation projects,
23 and I also worked on our energy policy projects.

24 After that I left to become the Deputy Executive
25 Director of Greenpeace USA for roughly two years. In that

1 capacity I was the chief operating -- day-to-day chief
2 operating officer for Greenpeace USA responsible for the
3 day-to-day operations of the organization.

4 **Q.** What timeframe -- do you have a sense of the year?

5 **A.** That was 1997 to 1999.

6 At the tail end of that period I also served as the
7 acting executive director. And after we hired the incoming
8 executive director I left and went back to the state PIRG
9 network for about a year and a half, I think, where I served
10 as -- I was the national director for state programs. So I
11 supervised and worked with all of about 26 different state
12 PIRGs by working on a range of environmental and consumer
13 issues.

14 Then I left to go to school. I was in enrolled in
15 Andover Theological School with the intention of getting a
16 Masters in Divinity. Then somewhere in there my then wife
17 Angela got pregnant with our son. After he was born I opted
18 to be an at-home full-time dad for about three or
19 four years.

20 Let's see, then after that I did some nonprofessional
21 or nonpaid work. But then I took a position as the
22 Executive Director Aperion Institute for sustainable living
23 in Rhode Island. I'm not exactly sure of the years 2006 and
24 7, I believe.

25 I spent several years as a green builder carpenter and

1 handyman. And was cofounder of a project called the Jamaica
2 Plain Greenhouse, which was a rehab of an abandoned building
3 in Boston to demonstrate a low income and low carbon impact
4 building rehab.

5 **Q.** Okay.

6 **A.** Most recently I'm the cofounder and a fellow of an
7 organization called the Climate Disobedience Center.

8 **Q.** One thing that I know that we passed up in your resume, can
9 you describe what the Bright Lines Institute is or the
10 Bright Lines Network and how that fits into your
11 professional history?

12 **A.** At the time that I was shifting from being a full-time dad
13 so when my boy was 3 or 4 years old I pulled together, and I
14 helped coordinate the creation of network, which is called
15 the Bright Lines Network. It was composed of both staff and
16 the alumni of major environmental organizations and also
17 some climate scientists. The purpose of that was to have a
18 conversation about what we were trying to do as an
19 environmental and climate movement in the United States to
20 address climate change, given that the politics of the civic
21 conversation weren't allowing us to talk about the scale of
22 the topic. And so in that capacity we had kind of a think
23 tank. We had a number of conversations. We did some
24 writing. We came up with some alternative strategies or
25 ways that we wanted to try to influence the US environmental

1 movement, and through that brought a conversation about
2 climate change.

3 Our particular concerns were that it is a matter of
4 geophysical reality, what is actually happening in the world
5 was increasingly becoming a partisan politicized issue, and
6 that this was problematic because it separated -- whether
7 there might be a variety of opinions about what to do about
8 the problem. We were increasing -- this was ten years ago
9 -- increasingly moving into a situation where the partisan
10 fight would be whether or not there was a problem at all.

11 **Q.** All right. I'm handing you what's been marked as
12 Exhibit 22. Could you describe what this document is?

13 **A.** This is one part of what we call the Bright Line Strategy,
14 which was summarizing in writing what I just described, an
15 effort to encourage different public response, especially
16 from environmentalists about how to have a public
17 conversation about climate change.

18 **Q.** Did you write this?

19 **A.** Yes.

20 **Q.** And was this -- does this document, was this part of the
21 formation of your understanding that led you to the
22 October 11th incident that we are going to talk about in a
23 little bit?

24 **A.** Yes, it was. At that time ten years ago that we needed to
25 shift off of essentially incremental passings of small

1 pieces of legislation in Washington that did not engage a
2 full robust public debate between people who wanted to deny
3 that there was any problem at all and those of us in science
4 that said we have a big problem.

5 MS. REGAN: Your Honor, we'd offer Exhibit 22.

6 MR. JOHNSON: Objection as to hearsay.

7 THE COURT: It hasn't been marked yet.

8 MS. REGAN: Marked?

9 THE COURT: Yeah, we need to get it marked as an exhibit
10 first.

11 MS. REGAN: Your Honor, should I address Mr. Johnson's
12 objection?

13 THE COURT: Let me see it. Go ahead.

14 MS. REGAN: Thank you. The document is not hearsay
15 because Mr. Ward just testified he wrote it; that it was his
16 belief regarding the issues relevant to this case, and that it
17 formed his understanding that led him to take action on
18 October 11th.

19 MR. JOHNSON: It's his opinion. He's testified to it. I
20 don't think the written document of what he's testified to
21 offered for its truth, which is actually his opinion, is
22 admissible. It's hearsay.

23 THE COURT: It is all admitted.

24 MS. REGAN: Thank you.

25 BY MS. REGAN:

1 **Q.** Okay. Mr. Ward, can you maybe encapsulate for the jury your
2 interest or work with regard to the energy and climate
3 experience that you obtained over the 40 years you've been
4 doing this?

5 **A.** I'll try to do it quickly, yes. I have worked on energy
6 policy, air pollution, and very specifically climate change
7 as a public advocate and as a researcher for 40 years now.
8 Climate change didn't itself become an issue until about
9 halfway through. But I started this as early as when I was
10 a college student for a project. I wrote a piece of
11 legislation for the Massachusetts' legislature to encourage
12 there were sufficient cars by tying annual registration fees
13 to how efficient your car is. So at the time if you'd been
14 driving a Delta '99 you would have to pay \$100 registration.
15 If you were driving a fuel efficient VW you would have
16 gotten a \$25 rebate. That bill didn't go anywhere.

17 But even then environmentalists were trying to
18 encourage policies that would emphasize fuel efficiency. So
19 not needing to generate more electricity or use more
20 gasoline. Since then I have engaged in a range of work,
21 both myself and also as the director of staff who are
22 working in the state and federal level.

23 So I've worked on everything from lobbying for federal
24 and state appliance efficiency standards. I have or my staff
25 have worked on engaging in utility rate setting to encourage

1 efficient use of energy to decrease air pollution. We worked
2 on a range of air pollution issues, including using
3 litigation to sue companies that have violated their air
4 pollution permits.

5 Beginning late '90's I began to work on climate change
6 in New Jersey doing public education campaigns. We were one
7 of the first organizations to release maps that would show
8 what sea level rise impacts might be in New Jersey,
9 particularly important there. But I worked at Greenpeace.
10 We were engaged in international negotiations around the
11 Kyoto Treaty, which was adopted but not submitted for
12 signature in the US to the Senate. And I think I mentioned
13 earlier that I worked in the Green Build area to develop
14 model low carbon impact building techniques and to build
15 models that, particularly people in the building trades to
16 come and see how even using our existing techniques of sheet
17 rocking and so forth if you use them in a particular
18 approach we could achieve really high energy efficiency.

19 **Q.** So is it accurate to say that in your professional capacity
20 that you've worked on the international, national, and the
21 local levels with regard to passing laws?

22 **A.** Passing laws, also in court on public education, yes.

23 **Q.** So litigation, public education, advocacy you've actually
24 helped draft those?

25 MR. JOHNSON: Objection, leading.

1 THE COURT: Sustained.

2 BY MS. REGAN:

3 **Q.** Have you drafted any bills that became legislation?

4 **A.** Yes. I worked on building energy efficiency standards and
5 equipment standards at the state level. And indirectly
6 participated on negotiations on the Kyoto Treaty, which is
7 an international treaty.

8 **Q.** All right. So how did the birth of your son impact the
9 trajectory of your work.

10 **A.** Well, let's see, for one thing I went from being a
11 professional staff person engaged in policy, and lobbying,
12 overseeing staff to overnight being an at-home dad. I never
13 really had an infant on my hands before. It was a really
14 significantly different experience suddenly going to parks
15 with the nannies in a park outside of DC.

16 As I was beginning to look to go back to work I had
17 this opportunity of time and I used it to, again, to read
18 the latest research, and this is about 2004, 2005, on
19 climate change. I was certainly aware of it as an issue.
20 But there was a set of research about ten years ago now that
21 varied significantly and alters our understanding of what
22 the problem is. Prior to that we understood climate change
23 as being something that would occur over many thousands of
24 years. It would be very slow. Most of the impacts that
25 were projected are things we can imagine, ways to either

1 work around basically what we started or what scientists
2 started learning in the mid-2000's, which was the time I was
3 reading this.

4 While I was reading it, I was living by the seashore I
5 was raising my kids. I was kind of watching him play. It
6 was sort of very personal and visceral understanding.
7 Because as we were talking about -- he happened to be born
8 in 2000. So any of the projections what might happen. In
9 my own mind I thought oh, okay, if this is going to be
10 happening in 2030 then he's going to be 30. In 2050 he will
11 be 50. It was a very clear timeline for me about what this
12 meant.

13 The thing that I particularly worked by Dr. James
14 Hansen, more than any other scientist a person who began to
15 understand and first testified before Congress what problems
16 were with climate change. He and other scientists in about
17 2004 and 5 began to write and understand what the impacts of
18 a warming atmosphere and warming waters could well be on the
19 vast sheets of ice that sit in Greenland and in the
20 Antarctic.

21 **Q.** Can you explain, for those of us who may not know, can you
22 explain a little bit who Dr. Hansen is?

23 **A.** Dr. James Hansen was the director of that NASA space, as far
24 as space programs, space science institute based at Columbia
25 Institute. He was responsible for mostly how we use

1 Satellites to understand what is happening on the planet. So
2 he and other scientists at NASA and Columbia began to look
3 at the history of the earth going back hundreds of thousands
4 of years to compare or to look at the experience of what
5 happens when we put a lot of carbon in the atmosphere and to
6 begin to note that there's a direct connection between
7 carbon in our atmosphere that comes primarily from burning
8 fossil fuels, which acts as a blanket insulating the earth,
9 heats up the atmosphere. The atmosphere heats up the water,
10 the oceans. The combination of those two things when you
11 look at over time tends to melts our ice caps and melts the
12 ice sheets that are gigantic ice sheets that are sitting in
13 Greenland and Antarctica and this raises sea levels.

14 So what was discovered in 2005 is that we are on a
15 trajectory to have those ice sheets disintegrate. And when
16 they disintegrate it doesn't happen slowly and incrementally
17 necessarily. It can happen very, very quickly. Because
18 water can penetrate to the bottom of these giant shelves,
19 and they begin to slip and slide. They begin to move very
20 fast.

21 Now, ten years later we are now seeing things that
22 scientists thought might be happening thousands of years
23 from now, we are beginning to see right now. There is, in
24 fact, a giant iceberg that's about to calve off of an ice
25 shelf in the Antarctica. It may have already happened.

1 There is only eight miles left. When it does it will be the
2 largest iceberg ever seen about half the size of the Olympic
3 Peninsula. It's on water so it's already flooding. It
4 won't increase sea level rise. But it's one of the pieces
5 of ice that hold back these giant ice shelves that are on
6 Antarctica. Once you break off pieces in front makes the
7 rest move so much more quickly.

8 So in a roundabout way of saying I'm sitting there and
9 I'm reading this stuff and going okay if the sea, you know,
10 if in our worst case looking at sea level rises around 5 or
11 8 feet it's possible within the lifetime of my son, and
12 that's a very different thing than what we thought before,
13 which is kind of sea level increases of inches or even a
14 foot, which you can kind of imagine how society can adapt to
15 that.

16 **Q.** All right. I would like to turn our attention to a couple
17 of charts here, which one would you like to talk about
18 first?

19 **A.** This one shows a --

20 **Q.** So this has been previously marked as Exhibit 18, and could
21 you tell me -- let's start off by talking about what is
22 this?

23 **A.** This is a chart that's produced by NASA space science
24 institute where Dr. James Hansen was a former director. And
25 it's a measure of carbon, which is measured in parts per

1 million going back 400,000 years of earth history. The
2 history comes from analyzing the little bubbles that are
3 collected in glaciers. Throw a core down so we know when it
4 was. This is a very accurate measure of photo carbon in the
5 atmosphere. You can see going back 400,000 years it goes up
6 and down.

7 In modern times we shoot up. So we're right now in
8 this chart about 406 parts per million. Since this chart
9 was done we now have gone up to 410 parts per million. We
10 are on a very quick trajectory to get to 600 parts per
11 million. So it's well above. This historical dotted line
12 here shows you 400 years it goes up and down. It's never
13 gone above 300 parts per million. Every time that it peaks
14 in one of these peaks the sea level goes up.

15 **Q.** Where is this chart from?

16 **A.** This is from NASA National Aeronautics Space Research.

17 **Q.** Dr. Hansen was one of the individuals responsible for this
18 chart?

19 **A.** I'm not sure.

20 **Q.** Did you read it?

21 **A.** He was the director of the institute that produced it.

22 **Q.** And did you review this chart and was this chart part of
23 your understanding prior to October 11th of 2016?

24 **A.** Yes. I think this chart actually might have an additional
25 month or two, but I've basically been watching. A number of

1 people, we look at this. These numbers come in every month
2 from an observatory in Hawaii. If you are concerned about
3 this you can follow it month to month. And monthly we're
4 just going up. Last month was the highest recorded than it
5 has been virtually in preceding months.

6 Q. Just to understand -- well, let me offer Exhibit 18 please.

7 MR. JOHNSON: The State would object to relevance, Your
8 Honor. He doesn't know the exact origin of it. I certainly
9 don't see how it's relevant to what happened on October 11th here
10 in Skagit County.

11 THE COURT: Sustained.

12 MS. REGAN: Sustained? He did testify that this was the
13 basis of his understanding, and that it comes from Hansen's
14 climate studies.

15 THE COURT: Sustained. He was able to testify to it.
16 The jury has that knowledge.

17 MS. REGAN: Okay.

18 BY MS. REGAN:

19 Q. What does this line that says highest historical Co2
20 level --

21 MR. JOHNSON: Your Honor, if it's sustained can we take
22 the exhibit down.

23 THE COURT: He may continue to testify. I'm sustaining
24 the exhibit being entered and going back to the jury.

25 MR. JOHNSON: Okay. Thank you.

1 THE WITNESS: The dotted line shows the level.
2 Essentially this is the highest in 400,000 years that's allowing
3 carbon in the atmosphere. It has not gone above 300 parts per
4 million. We are now at 410 parts per million.

5 BY MS. REGAN:

6 **Q.** And what is the role of, what did you learn from this
7 science with regards to tar sands?

8 **A.** Well, if you look at what are the major sources of carbon
9 going into our atmosphere the vast bulk of it is burning
10 fossil fuels. So it's gas, oil, and coal. And if you look
11 at which are the worse sources, if you are trying to address
12 this problem by reducing the amount of carbon going into the
13 atmosphere and do it in the best possible most efficient way
14 you want to pick the worst things that we're burning, and
15 those are coal and tar sands oil. Both of those sources put
16 out the highest levels of carbon. And in the case of coal
17 it also has other -- it's particularly bad.

18 **Q.** Okay. Did you undertake a study with regard to the impact of
19 tar sands on the climate?

20 **A.** No. I mean I looked at the available set of available
21 studies of what are the biggest sources of our problem,
22 which clearly is coal and tar sands oil. So to the extent
23 that I and others are trying to figure out ways to, you
24 know, directly address the problem then those are the places
25 you would want to start.

1 **Q.** All right. Okay. So we discussed the Bright Lines paper.
2 Let's turn to so you spent a few years researching climate,
3 your son is growing up. What happened next with regard to
4 your work on the climate?

5 **A.** Well, in the production of this Bright Lines strategy we
6 were proposing kind of a different approach than the
7 mainstream advocates for how to solve the problem. And it
8 included a variety of things, one of which was based on our
9 looking at how does change happen. How does change happen
10 in a situation, especially in America where the kind of
11 underlying reality of what needs to be done is so far out of
12 the public conversation that it's not really being
13 addressed. I mean that's the situation we're in, what do you
14 do in those cases. And if you look at American history,
15 which I did, it's been several months and reading experts on
16 how does change happen. We looked at cases where relatively
17 small numbers of people were able to change the public
18 conversation, in some cases the outcome by stepping outside
19 of the established conversation and particularly using
20 protests and in some cases direct action change that debate.
21 So starting really early on from the tea party, to the
22 evolution movement, to suffrage, to prohibition, to the
23 civil rights movement, and in our time antiabortion
24 movement. All of these were examples of relatively small
25 numbers of people who had, you know, whatever you think

1 about specifics of the subject who believed they had good
2 evidence for having ahold of a real fundamental truth, were
3 able to change the course of a national conversation on
4 politics.

5 So I argued in writing and speeches that we needed to
6 kind of fundamentally change what we were doing including
7 adopting that kind of a strategy because the conversation in
8 purely the civic area was increasingly being dominated by
9 this spending of money by fossil fuel companies, especially
10 over the last ten years where about half a million dollars
11 had been spent by fossil fuel companies to affect, put this
12 conversation on climate change where we have seen, what, ten
13 years ago was a heroic conversation across all political
14 spectrums of all parties an agreement on the problem,
15 disagreement on what to do about the solution. But there's
16 a significant number, for example, of Republicans, including
17 presidential candidates, who agreed we have a problem. That
18 we have seen collapse over the last ten years. So given
19 that situation what do you do?

20 One of the things that I argued and others began to
21 argue was that we needed to engage not just in protests but
22 actual direct action where people would actually act and put
23 our bodies on the line to try to address this problem, try
24 to stop the actual burning because of the situation we're
25 in.

1 **Q.** Okay. What led to your next endeavor along those lines?

2 **A.** Well, again, partly because and it was difficult because I
3 had a child I felt, you know, an obligation to -- I felt
4 like I didn't want to be in some situation where my son
5 might come to me in a couple of decades and go what did you
6 do, dad? And I needed to balance that against the potential
7 risk to myself. But I again I concluded that it wasn't
8 enough to simply speak about taking action. I needed to do
9 it myself. So I did this first about five years ago now with
10 a partner Jay O'Hara. Where we actually -- I was living in
11 New England. We determined what is the biggest contributor
12 to carbon pollution in the northeast, and that is or was
13 the Brayton Point Power Plant in Somerset, Massachusetts.

14 MR. JOHNSON: Your Honor, I'd object at this point. It's
15 a narrative and it's irrelevant.

16 THE COURT: Sustained.

17 BY MS. REGAN:

18 **Q.** Did you engage in civil disobedience with regard to that
19 campaign?

20 MR. JOHNSON: Objection, relevance.

21 THE COURT: Sustained.

22 BY MS. REGAN:

23 **Q.** Were there any actions that you took that motivated you or
24 helped to form your intent with regard to the October 11th
25 incident?

1 **A.** I'm not sure I can answer this or not.

2 **Q.** Answer if you can. He can object if he wants to.

3 **A.** Yes, I embarked on a couple of different campaigns since
4 2005 and last October. All of which were aimed at engaging
5 in direct climate action programs, you know, specific
6 targets of carbon emissions. So one of them was Brayton
7 Point Power Plant in Massachusetts and another more recently
8 was the Anacortes refineries in May of last year.

9 **Q.** Okay. With regard to the Brayton Point incident you
10 described what were you intending to do with that action?

11 MR. JOHNSON: Objection as to relevance.

12 THE COURT: Sustained.

13 BY MS. REGAN:

14 **Q.** Were there any acts of civil disobedience you engaged in
15 that ultimately worked?

16 MR. JOHNSON: Objection as to relevance.

17 MS. REGAN: This goes to his motivation and intent.

18 THE COURT: You may answer.

19 THE WITNESS: Depends on how you define "worked". So no,
20 nothing is working because the problem is getting worse. If part
21 of the definition of working is to engage in a direct action,
22 which affects whether or not a particular source of emissions
23 continues, then yes, I have engaged in at least two actions that
24 contributed to the shutting down of major sources of carbon
25 emissions.

1 BY MS. REGAN:

2 Q. What are they?

3 A. One was the Brayton Point Plant. The other one is the Shono
4 campaign two years ago, which sought to encourage Shell Oil
5 not to continue to drill in Arctic.

6 Q. Okay. And the Brayton Point power plant has been closed at
7 this time?

8 A. As of last Wednesday it closed, yes.

9 Q. Were you arrested as a result of --

10 MR. JOHNSON: Objection as to relevance.

11 THE COURT: Sustained.

12 BY MS. REGAN:

13 Q. Prior to 2013 have you ever been arrested?

14 MR. JOHNSON: Objection as to relevance.

15 THE COURT: Sustained.

16 BY MS. REGAN:

17 Q. Was breaking the law part of your intent in working on
18 climate change issues in the US?

19 A. Breaking the law has never been and is not now part of my
20 intention in working on climate change.

21 Q. Turning to the October 11th, 2016 incident that you heard
22 testimony about yesterday, could you please describe to the
23 jury in your own words why you decided to engage in that
24 action?

25 A. Well, our sense of crisis, you know, continues to escalate.

1 We had just gone through -- nearly gone through a
2 presidential election where climate change was barely
3 discussed. Presidential elections are, in essence, are one
4 time when we can really talk about what is most important
5 here. So I worked, got together with a group of people, and
6 we decided to take action to try to directly address the
7 burning of tar sands oil, which is our most significant
8 contributor to the problem. And we came up with a plan of
9 action to shut down all five pipelines that carry tar sands
10 oil from Canada into the US. And to do that, this was in
11 October, while calling on the Federal government, the
12 president, to support us in that action because that really
13 is the proper function of the Federal government is to
14 identify, climate change is a top security channel to the
15 United States that determined or had been determined by the
16 Pentagon at that point. The president himself had identified
17 this as a major problem. We didn't really expect that that
18 would happen, but it seems important to us to call on the
19 Federal government to do what is necessary to do.

20 **Q.** Describe the group of people that you worked with?

21 **A.** There were or are five of us. The other folks include Emily
22 Johnson, who is a poet and former computer web designer who
23 now works on the climate full time, and Annette Klapsten,
24 who is a retired attorney, and Leonard Higgins who is a
25 retired computer planner for the State of Oregon, and

1 Michael Foster, who is a retired therapist. We all got
2 together and decided to take this action because all of us
3 shared the same concern that we had this total split between
4 what is actually being done to address the problem and real
5 scale of the threat.

6 **Q.** Where were these pipelines located?

7 **A.** There are two pipelines in Minnesota, and one in North
8 Dakota, and one in Montana, and one in Washington.

9 **Q.** And we watched the video yesterday, I won't play it again,
10 but this video shows your Jeep arriving, and then the video
11 shows you doing something on the hood of your car; do you
12 recall what you were doing at that time?

13 **A.** I was getting gear together. I was checking to make sure
14 that Jay O'Hara, the person in our command center had
15 communicated with the pipeline company. I was setting up my
16 iPhone to live stream. The reason we were doing that is
17 that we wanted to make sure that the pipeline company knew
18 we were actually there so if they thought maybe it was just
19 a prank call or something they could actually go to our site
20 and see that I was there. And those are the
21 (indistinguishable) packing up to go over to the site.

22 **Q.** And you mentioned that one of the things that you had happen
23 was a phone call to Kinder Morgan itself?

24 **A.** Yes. The way we had arraigned to do this is to have
25 telephone calls going into each of the pipeline companies to

1 Kinder Morgan beforehand to alert them it was our intention
2 to shut down the safety block valves and to give them an
3 opportunity to close the pipeline themselves before we
4 closed the main block valves.

5 **Q.** All right. I believe you mentioned that there was a letter
6 that you sent in advance as well?

7 **A.** We sent a letter to President Obama beforehand explaining
8 what we were doing, pointing out the vast gap between the
9 threat to the earth and to our nation and what the Federal
10 government was doing about it and asking him to use Federal
11 government resources to support it.

12 **Q.** So does that letter encapsulate your understanding and
13 intent in engaging in the October 11th event?

14 **A.** Yes, it does.

15 **Q.** Did you, in fact, send that to President Obama?

16 **A.** Yes.

17 MS. REGAN: Your Honor, I would offer what is marked as
18 Exhibit 21, the letter that Mr. Ward sent to President Obama.

19 MR. JOHNSON: Object as to hearsay, Your Honor. He's
20 already testified as to the contents.

21 THE COURT: Sustained. The jury is aware of it. He's
22 already testified as to it. The letter actually gets sent back.

23 MS. REGAN: Okay.

24 BY MS. REGAN:

25 **Q.** I'm going to approach and hand you that letter. Could you

1 summarize your main points that you were attempting to relay
2 to the President prior to shutting down the tar sands
3 pipeline?

4 **A.** Let's see. We reminded the president and described the
5 latest science is terrifying. We reminded him that he
6 himself has written about the history of past societies that
7 are unable to accept ecological amendments and how they have
8 collapsed. We pointed out that the particular difficulty of
9 the particular problem of tar sands. We noted that this is
10 not a problem without solutions, but we have immediately
11 available to us alternatives to fossil fuels. We asked that
12 the president invoke the National Emergency Act and continue
13 to shutdown the tar sands pipelines we have initiated. And
14 to immediately begin a process of federal closure of all US
15 coal extraction, and to put forth a plan before Congress for
16 national mobilization to transfer US energy from fossil
17 fuels to renewable energy resources, maintain and expand
18 natural carbon sinks, and undertake a US-led and financed
19 global campaign to meet the international targets that
20 affect climate change.

21 **Q.** Did you ever receive any response from the President or his
22 administration in response to this letter?

23 **A.** We did not.

24 **Q.** Based on that what did you do the very next day? Can you
25 describe for the jury?

1 **A.** Well, personally I went to, as shown in the video, went to
2 the block valve in Burlington, and cut a chain to get in,
3 cut a chain off the safety block valve, closed the valve,
4 put my own chain on it, put some sunflowers on it as a
5 symbol of a better, brighter, future, and waited for the
6 deputy.

7 **Q.** All right. In choosing to close down the block valve in
8 Burlington, Washington was there any specific information
9 that you had relating to this area and the threat of climate
10 change?

11 **A.** Well, I had done -- I had looked at what the potential sea
12 level -- I particularly focussed on sea level rising. All
13 of the other impacts are things that might make it very
14 difficult for us. But sea level rise is the single thing
15 that is described as potentially civilization busting. In
16 other words, if the sea rises fast enough it will flood so
17 much of, especially our urban areas, that it will be
18 difficult for us to respond. And this is a chart of -- it
19 was based on the US climate envoy. Jonathan Pershing in
20 October's projection of the worst case in the near term of
21 2050, which is a near term, of what five feet of sea level
22 rise would look like in Skagit County.

23 **Q.** So in looking at this map --

24 MR. JOHNSON: I would object as irrelevant at this time,
25 Your Honor, before we discuss this much further.

1 THE COURT: He may testify.

2 MS. REGAN: Thank you, Your Honor.

3 BY MS. REGAN:

4 Q. In looking at this map what is this area right here this
5 blue (indicating)?

6 A. The blue areas are where -- what will be under water in the
7 worst case of five feet of sea level rise. Let's just say
8 worst case doesn't mean -- worst case for this year. We're
9 on track to have for sure five feet of sea level rise. The
10 question is when. The worst case means it happens
11 particularly quickly. So in Skagit County that means a lot
12 of agricultural areas, tulip fields are going to be under
13 water.

14 Q. What do the green areas mean?

15 A. The green areas are -- I'm not sure.

16 Q. And you studied this map prior to October 11th?

17 A. I did look at this map, yes, prior to.

18 Q. And was this form part of the basis for your action on that
19 day?

20 A. Well, yes. In a sense of, yes, in a sense of you can look
21 at this equivalent map and any shoreline around the world
22 and I'm concerned that if this happens on the globe then we
23 won't be able to survive it, so yes.

24 Q. So is it accurate to say that this formed part of the basis
25 for your action on the 11th?

1 **A.** Yes.

2 MS. REGAN: Your Honor, we'd offer Exhibit 19.

3 MR. JOHNSON: No objection.

4 THE COURT: All right. Be admitted.

5 BY MS. REGAN:

6 **Q.** Okay. So what was your intent in shutting off that safety
7 valve on the 11th?

8 **A.** To stop the flow of tar sands oil running through that
9 pipeline.

10 **Q.** Why were you attempting to do that?

11 **A.** I was attempting to take the most effective measure that I
12 could think of to address this problem to avoid cataclysmic
13 climate change.

14 **Q.** Did you believe that there was anything left to do that may
15 have been legal that could have addressed the issue?

16 **A.** I think --

17 MR. JOHNSON: Objection, Your Honor, we've addressed
18 that.

19 THE COURT: He may answer.

20 THE WITNESS: I think that there are legal steps that can
21 be taken, and I continue to take those. But I think that alone
22 they are insufficient.

23 BY MS. REGAN:

24 **Q.** What are the other steps that you continue to participate
25 in?

1 **A.** Well, I'm engaged in efforts in my own state, which has been
2 quite successful. The City of Portland has just announced a
3 plan to shift to 100 percent renewable energy, and I
4 supported that. I am engaged in general public education.
5 And I am increasingly looking at ways to support candidates
6 for office who endorse a significant plan of action on
7 climate change.

8 **Q.** Did you take your decision to close the tar sands pipeline
9 lightly?

10 **A.** Lightly, no, no. It was a very, very, very difficult
11 decision that I wrestled with a lot because the consequences
12 of doing that could obviously be severe and because I have
13 17-year-old son, who is still in high school, and it was
14 very difficult decision.

15 **Q.** What is a block valve?

16 **A.** Safety block valves are a means to close a pipeline
17 manually. They are buckled to pipelines for a number of
18 different reasons, the maintenance use, and also in the
19 event that pipelines need to be closed and in the event of
20 an emergency, and for some reason the main command center is
21 not able to do so.

22 MS. REGAN: Your Honor, we would like to offer a short
23 five-minute video at this time. I believe the Prosecutor will
24 object to it. I don't know if you want to hear that out of the
25 presence of the jury or not.

1 THE COURT: Yeah, let's do that. We'll give you a short
2 break.

3 (JURY EXCUSED)

4 THE COURT: Okay. Be seated.

5 MS. REGAN: Your Honor, I'm marking what is being
6 identified as Exhibit 23. It includes a five-minute video that
7 depicts all five of the valve turners. Mr. Ward testified the
8 intention of this action wasn't just to shut down the single
9 pipeline but was to actually shut down all flow of tar sands oil
10 into the US. And this video shows a very brief snip it of each of
11 the different states. And we would offer it in order to
12 illustrate to the jury the full breadth of what his actions and
13 intentions were.

14 MR. JOHNSON: I would object, Your Honor, having watched
15 the video. It is essentially a propaganda video advocating for
16 their cause, and it includes hearsay statements from other
17 defendants from other states from these other pipelines. Mr.
18 Ward has been allowed to testify about the intent, about the
19 breadth of it, that it happened in other states. I think if I
20 was a defense attorney for one of the other defendants I would
21 object to it as well. In this case, you know, there's dramatic
22 music. It's just the nature of it is just duplicative of what's
23 already been testified to, and I believe has more potential to be
24 prejudicial than probative since we already have that
25 information.

1 MS. REGAN: Your Honor, a picture speaks a thousand
2 words. It may be duplicative with some of Mr. Ward's testimony,
3 but it does fully demonstrate his intention for this actions.
4 And I think for most of the jurors it's difficult to really
5 understand, you know, what these actions were, and I think that
6 video goes a long way. We actually redacted out any references to
7 arrests, illegal actions, and court. We would be happy to have
8 you view it, but we would like to submit it as part of our case
9 in chief.

10 THE COURT: Well, stick it on, let's watch a minute or
11 two, and let's see where we go.

12 **(THE VIDEO IS BEING PLAYED)**

13 THE COURT: All right. Thanks. I've had an opportunity to
14 watch the video, and I'll sustain the motion. There is way too
15 much unsolicited testimony on the video to play the video. It
16 would be the equivalent of allowing each and every person on the
17 video to testify to the jury without being sworn, without being
18 subject to cross examination by Mr. Johnson. So I think the
19 video is outside the bounds for purposes here. But I have allowed
20 you some leeway, a lot of leeway in questioning Mr. Ward about
21 the fact that he was part of a planned effort by other activists
22 across the country at the same time. And the purposes that they
23 desired to achieve you can certainly testify to that, but showing
24 the video is a bit out of the bounds. So I'll sustain the
25 objection as to the video.

1 MS. REGAN: Thank you, Your Honor. We would make an
2 offer with regard to the exhibit.

3 THE COURT: Yes, I think you've effectively done that by
4 playing it for me.

5 MS. REGAN: Yes. Thank you.

6 THE COURT: Okay. Thanks. We can bring the jury back
7 in.

8 MS. REGAN: Also my thing is out of batteries.

9 **(JURY NOW PRESENT)**

10 THE COURT: Okay. You may continue.

11 MS. REGAN: Thank you. Defense rests.

12 THE COURT: Mr. Johnson, any cross examination?

13 MR. JOHNSON: None, Your Honor.

14 THE COURT: All right. You may step down, Mr. Ward.
15 Thank you.

16 Ladies and Gentlemen, that concludes the testimony. It went
17 a little briefer than I thought. That's a good thing. So at
18 this point in time I am going to excuse you.

19 Let's see, how long do you think your closing will be?

20 MR. JOHNSON: 10 to 15 minutes.

21 THE COURT: How about you?

22 MS. REGAN: 15 to 20 minutes.

23 THE COURT: Let's bring you back at 11:00. Take a little
24 walk. Don't discuss the case or anything. We'll bring you back
25 at 11:00. I'm optimistic we will be done at 11:00. It may be

1 that we are not quite ready to go and we'll have to send you out
2 for a longer lunch. We'll see where we are going to go. You may
3 be excused. Thank you.

4 **(JURY NOT PRESENT)**

5 THE COURT: Okay. I've looked at your jury
6 instructions. It looks like defense they are pretty consistent
7 except for a couple of areas. One the defense is offering a
8 lesser included Trespass 2.

9 MR. JOHNSON: I don't think it applies, Your Honor. The
10 elements are not the same. The intent to commit a crime therein
11 is unique to the Burglary II, and I think it should stand alone.

12 THE COURT: There's obviously no WPIC for criminal
13 sabotage. There's a rather lengthy statute with lots of orders
14 in it and alternatives. And you both proposed -- well, the
15 defense proposed the definition directly from the statute. And
16 then you both proposed a to convict that are extremely
17 dissimilar. And the defense has also proposed quite a lengthy
18 19.03 instruction with all the little questions. So we have to
19 rectify those issues.

20 As to the lesser included, Mr. Johnson's position is the
21 lesser included does not include the element of intent, which
22 would be a necessity in order to connect Burglary II does require
23 intent. So the elements are not necessarily in line. Did we go
24 with the lesser included last time?

25 MR. JOHNSON: We did not.

1 MR. HURVITZ: It wasn't proposed last time, Your Honor.

2 THE COURT: Yeah, I didn't think it was.

3 MR. HURVITZ: I would suggest that the element of concern
4 to Mr. Johnson is one that is for the jury to decide.

5 THE COURT: Well, yeah. There's a legal -- there's a
6 factual -- in determining whether the lesser included goes down
7 you've got to look at the factual basic and the legal, and they
8 both have to align. They both have to be sufficient, that's the
9 problem. Just a second here.

10 Well it looks like an old case back in the day, 1984,
11 wasn't that a book by George Orwell? I haven't thought of that
12 in years. Anyway 1984, State v. Britain holds the trial court
13 should not err in refusing to instruct the 2nd Degree Crim
14 Trespass, the lesser included. So from that language it looks
15 like the court could go either way. Then it goes on to say the
16 court stated that 2nd Degree Crim Trespass is applicable only in
17 situations in which the defendant enters, or remains unlawfully
18 on private property not constituting a building. So I guess that
19 could apply here. So I'm leaning towards giving that lesser
20 included (indistinguishable)?

21 MR. JOHNSON: We do have a building error, Your Honor.

22 THE COURT: Not constituting the building. You know, I
23 think the definition, I didn't look it up, I believe the
24 definition for Crim Trespass, the definition for building is
25 different in Crim Trespass than it is for Burglary. Burg II we

1 know that there's an instruction that says a building is any
2 fenced area. I'm not sure that's the same for Crim Trespass.

3 MR. JOHNSON: Crim Trespass I would include a building,
4 II would include private property.

5 THE COURT: Private property, right.

6 MS. REGAN: Well, Your Honor, I would only add that given
7 the situation last time seems like a practical approach
8 potentially alleviating juror problems again.

9 MR. JOHNSON: I don't think that was the issue at all,
10 Your Honor.

11 THE COURT: Yeah, that probably wasn't the problem last
12 time, but it could have alleviated any -- well, I'm leaning
13 towards giving it, I think.

14 The other issue is your jury instruction for sabotage or
15 your to-convict instruction was extremely -- you included every
16 single alternative under the sun, which then created the arguable
17 necessity for a specific verdict form. Mr. Johnson cherry picked
18 out of the statutory language just the specific issues that he
19 was addressing here.

20 MR. JOHNSON: It's our burden, Your Honor.

21 THE COURT: It's their burden, right. So if he wants to
22 limit himself to just those specific things I guess he could do
23 that.

24 MR. HURVITZ: Your Honor, all I can say is this: We know
25 that the jury instruction committee has not favored us with a

1 pattern instruction.

2 THE COURT: Yes, that's true.

3 MR. HURVITZ: For better or for worse the legislature
4 enacted a convoluted statute. And you know that's what the
5 legislature gave us. And it's an unusual situation where we're
6 faced with crafting a jury instruction where there is no pattern
7 instruction where the statute is quite frankly poorly drafted.
8 But that is not our doing. The legislature gave us that. I think
9 the statement Mr. Johnson sees that the jury is going to struggle
10 more with the convoluted statute than with one that he as a super
11 legislature has determined he would like to streamline. I
12 understand why he wants to do that, but the fact of the matter is
13 we're all stuck with the same statute. We don't get to modify it.
14 We don't get to edit it. We don't get to streamline it. It is
15 what it is. And our instruction and special verdict form simply
16 reflects what the legislature has given us, nothing more.

17 THE COURT: Well, the first problem with your form is
18 when you read the statute and, you know, I'm not sure it's poorly
19 worded it's just lengthy with lots of alternatives in comparison
20 to all of the poorly worded statutes that have been handed down
21 by the Washington legislature, this one is probably not even top
22 10. But it is wordy. And when you read the actual RCW, I think
23 it's 9.05.060 or something, it seems to state that one of the
24 things that has to be in there is wherein any person is employed
25 for wage. And in your proposed instruction you only put that

1 particular verbiage in after Subparagraph Q. Any public or
2 private business or commercial enterprise, then you go, comma,
3 wherein any person is employed for wage. I would submit that
4 comma, where any person is employed for wage, also would have to
5 follow any of the other agriculture when any person is employed
6 for wage, lumbering where any person is employed for wage,
7 manufacturing. And in your proposed you just have it under that
8 last alternative Q. So I'm not sure this, at that point,
9 properly even states what the statute is.

10 MR. JOHNSON: The one case on point, Your Honor, tried by
11 Mr. Norton in one of the southern counties many years ago that
12 was a point of contention for the Court of Appeals where they
13 must be employed for wage, and it was overturned on that basis.
14 So that is one thing that has to be in there.

15 THE COURT: Yeah, that is true. I'm saying only in this
16 defense proposed instruction it's only applicable to Subparagraph
17 Q that very limited alternative. It doesn't appear to be subject
18 to all of the other alternatives.

19 MS. REGAN: I can certainly jump on my computer quickly
20 and revise it if the Court would prefer.

21 THE COURT: Yeah, but I'm not sure that I'm 100 percent
22 sure myself. This is very confusing this way. If we change it
23 we still may not be.

24 MR. JOHNSON: When we have cases with alternative means,
25 Your Honor, we are obligated.

1 THE COURT: All I've seen for 25 years the to-convict
2 instructions only use a specific alternative means and not
3 clutter it up with other alternative means. In this particular
4 case we all know that this doesn't involve fishing, or lumbering,
5 or agriculture. So it seems fairly commonsensible to not clutter
6 up any instruction wherein one of the elements could be
7 lumbering, mining, quarrying, fishing agriculture, mercantile, or
8 building enterprise.

9 MS. REGAN: I think the concern of the defense is that
10 perhaps the jury would find that none of those options actually
11 cover those facts at issue.

12 THE COURT: Well, I think that the jury would find that
13 -- the jury could only find that one of them or two of them could
14 apply in their wildest dream. They obviously find that most of
15 them do not apply.

16 MS. REGAN: So focussing them on or, you know, leading
17 them toward that may not be fair to the defendant.

18 THE COURT: I drafted a prospective instruction just out
19 of curiosity that pretty much mirrors the statutory language.
20 But it utilizes Mr. Johnson's format. Says that on or about
21 October 11th the defendant with intent that his or her act shall,
22 or with reason to believe that it may, injure, interfere with,
23 interrupt, supplant, nullify, impair, or obstruct the owner's or
24 operator's management, operation, or control of any agricultural,
25 stock raising, lumbering, mining, quarrying, fishing,

1 manufacturing, transportation, mercantile, or building
2 enterprise, or any other public or private business or commercial
3 enterprise, wherein any person is employed for wage, shall
4 willfully damage or destroy, or attempt or threaten to damage or
5 destroy, any property whatsoever, or shall unlawfully take or
6 retain, or attempt or threaten unlawfully to take or retain,
7 possession or control of any property, instrumentality, machine,
8 mechanism, or appliances used in such business enterprise. And
9 that the acts occurred in the State of Washington.

10 That mirrors the language of the statute. The problem is
11 it clutters it up with all kinds of alternatives that are not
12 going to exist in the mind of any juror such as stock raising,
13 lumbering, mining, quarrying, fishing.

14 MR. JOHNSON: Right, Your Honor. And there's been no
15 evidence offered that those are -- and that's where we have run
16 into trouble in the past with alternatives means is you're not
17 offering evidence of mining, for example, and you are presenting
18 that to the jury. The appellate courts don't like it because
19 it's confusing. It's not supported by the evidence. What's
20 supported by the evidence is transportation, the State has to run
21 the risk that we proved it was transportation, and that's why we
22 proposed the instruction we proposed.

23 THE COURT: Well, either way it has its problems that's
24 for sure. Mr. Johnson's method certainly alleviates the need for
25 that special verdict form, which is extremely problematic. The

1 defense has it broken down into six elements. Theoretically I
2 think there's only three of them when you read the statute.
3 You've doubled down on intentional. You've got element number
4 four that the defendant acted intentionally. And number five
5 says that the defendant intended to. So you've got two elements
6 that both speak to the intent or intentional element. And the
7 statute just says the defendant intends with the intent that the
8 act injured, interfered, interrupted. So that number four would
9 be --

10 MS. REGAN: Superfluous.

11 THE COURT: Yeah, absolutely. Well, that's problematic
12 with that. Number 3 is problematic because the employed for wage
13 only seems to apply to your sub Q rather than sub G through E,
14 that's problematic.

15 Element Number 1, I'm not sure that's a separate element
16 from element number 2. Element Number 1 talks about destruction
17 or damage, and that's an alternative with taking or threatening
18 to take possession or control of something. There's no evidence
19 here that Mr. Ward intended or attempted to damage or destroy
20 anything. Quite the contrary he was quite careful of what he did
21 to ensure that he didn't break or destroy anything. So those two
22 elements I don't think those are two separate elements either.
23 So it appears that Mr. Johnson's solution would be the
24 appropriate one under the statute.

25 And if the Court of Appeals doesn't like it and the WPIC

1 pattern instruction people don't like it they can give a solution
2 pretty easy or the legislature, but they kind of left us in a
3 quagmire down here at the worker bee level with no answer.

4 So I would propose that for the most part the State's
5 instructions and the defendant's instructions as to the
6 boilerplate instructions are mirror images. So we would give WPIC
7 102, which is the duty to discuss or I mean the duty to decide
8 the facts and the blurb about credibility of witnesses. The duty
9 to discuss -- or excuse me. That is the duty to discuss jury
10 instruction 1.04 that was both proposed. We can certainly give
11 that one. A separate crime charged in each count was proposed by
12 the defense; that one needs to go in. I don't think you gave
13 that one, did you?

14 MR. JOHNSON: No, I left it out again.

15 THE COURT: If you failed to give that one, that one
16 needs to go because there are two counts. So defense's 3.01
17 would certainly go in.

18 The 4.01 would go, that's the plea of not guilty
19 reasonable doubt instruction. Both propose that that would go.

20 MR. HURVITZ: Question, Your Honor.

21 THE COURT: Yes.

22 MR. HURVITZ: I believe that there's a slight difference
23 in the versions of 4.01, and which one was the Court going to
24 give?

25 THE COURT: The latest one, if you have an abiding

1 belief.

2 MR. HURVITZ: You are including that sentence?

3 THE COURT: Yeah, yeah. I've been including that one
4 since the pattern instructions came out about 15 years ago. Mr.
5 Johnson also proposed direct and circumstantial, one which is the
6 boiler plate one we get that one, that's the comment on direct and
7 circumstantial evidence we give that instruction.

8 The 60.03 definition of Burglary 2nd would be given. You
9 both proposed that.

10 The definition of intent is given, you both gave that. We
11 would give that one, 10.01.

12 The to convict, Burglary 2nd Degree both proposed, that
13 would be given 60.04.

14 The presumption instruction for Burglary the Prosecutor
15 proposed that would be given. That's pretty much a boilerplate
16 one.

17 The definition of buildings including any fenced area would
18 be given. The definition of unlawfully remains would be given.
19 That's a boilerplate one.

20 The proposed Mr. Johnson's instruction on to convict for
21 Criminal Sabotage and give the defense instruction 4.11, which is
22 the alternative lesser included instruction. Also so then we
23 would give the defense package for the lesser included Trespass
24 2nd, including the definitional instruction for knowledge.

25 I would also go ahead and give the defense instruction,

1 which is the statutory language from 9.05.060 for Criminal
2 sabotage that has all the alternatives in it. The jury is going
3 to get that.

4 Then if I had done a, since there's a lesser included,
5 basically use the defense concluding instruction, but I added
6 another sentence in there because there's three verdict forms.
7 Verdict Form A and B deal with Burg II, Crim Trespass 2 quagmire.
8 And Verdict Form C deals with Count II because there is no lesser
9 included in self defense. I just explained that.

10 Then the Verdict Forms A, B, and C, A would be the verdict
11 form for Burglary 2nd Degree. B would be the verdict form for
12 Crim Trespass 2nd. And C would be the verdict form for criminal
13 sabotage.

14 Okay. So I see that it is about five minutes to 11:00,
15 which means we are not going to get this done for the jury at
16 11:00, which I kind of assumed. So I think what we'll do is when
17 the jury comes back at 11:00 I'll cut them loose until 1:00.
18 Then we'll come back and do closings at 1:00.

19 MS. REGAN: Your Honor, could I ask for a ruling on the
20 two special instructions defense proposed?

21 THE COURT: Oh, yeah. I would not be inclined to give
22 those extreme comments on the other ones, editorial comments,
23 interesting but probably not going down. That's the defense
24 instruction 17 and 18. So what I'm going to do, counsel, is in
25 next hour I'm going to put these packets together, make copies

1 for you so you can look at them. Then that way you can make
2 formal objections and exceptions on the record to those so you
3 will have that for your prosperity. All right. Okay.

4 MR. HURVITZ: Should we come back shortly to do the
5 formal exceptions?

6 THE COURT: Yeah, why don't you guys come back at 11:30,
7 and we'll do that at that time. I should have that prepared for
8 you then.

9 MR. HURVITZ: Okay. Great.

10 THE COURT: Then I'll bring the jury back at 1:00, and
11 we'll do the instructions and argument. We should have this to
12 the jury by 2:00 probably.

13 Okay. Sounds good. Thanks.

14 **(OFF THE RECORD)**

15 THE COURT: All right. I've got a proposed set of
16 instructions 1 through 19 and Verdict Forms A, B, and C. As I
17 stated earlier, the State's instructions are basically in the
18 packets except for the concluding instruction and the lesser
19 included. And the defense instruction, the lesser included is in
20 the packet. The defense instructions basically that were not
21 given were those final instruction 13, which was the to convict
22 for criminal sabotage. 14, the necessity defense. 15, it's
23 including, which basically was given. 16 was not given. 17,
24 climate change. The comment was not given. And 18 the tar sands
25 was not. Nor was the lengthy questionnaire regarding the special

1 verdict form as to criminal sabotage.

2 Okay. As to instructions, Mr. Johnson, any exceptions or
3 objections.

4 MR. JOHNSON: I seem to be missing a Number 15.

5 THE COURT: 15, let's see what that would be.

6 MR. HURVITZ: 15 is the concluding instruction WPIC 155.

7 THE COURT: It might be that --

8 MS. REGAN: This packet is missing it as well.

9 THE COURT: That's because there isn't a 15 because I
10 skipped it, for no particular reason; I just failed to put 15 in.
11 I went from 14 to 16 it looks like.

12 MR. JOHNSON: Okay.

13 THE COURT: Because I have the original. I have the
14 originals here. So I know that it was not in another packet.
15 I'll just explain to the jury that's a clerical error made by me
16 because I can't count. There isn't a 15.

17 All right. Mr. Johnson, as to exceptions or conclusions?

18 MR. JOHNSON: I would take exception to 13, 14, and 16
19 with respect to the lesser included. I've provided a case up on
20 your passthrough there, State v. Peters from 1987, so relatively
21 new case. There are two factual prongs. One is the element and
22 two is a legal prong. As Peters points out first I would suggest
23 that because we are dealing with what is presented as, and I
24 believe there's sufficient evidence this was a building, the
25 Kinder Morgan facility based on the definitions provided in the

1 instructions, if we are offering a lesser, it should be Criminal
2 Trespass 1. And further, that it should not be given because
3 like in the Peters case the evidence before the Court the factual
4 prong is that there was intent to commit a crime therein. It was
5 admitted to with respect to closing the valve, locking it, and
6 this was a more traditional burglary case in the Peters matter.
7 But I believe the law and logics still applies here, and it
8 should not be given based on the admissions of the defendant. And
9 if it is given, Criminal Trespass 1.

10 THE COURT: Mr. Hurvitz.

11 MS. REGAN: Shall I wait to see if the State has any
12 further exceptions?

13 THE COURT: You can go ahead and comment on this one, if
14 you want.

15 MR. HURVITZ: I was asking Your Honor what you prefer.

16 THE COURT: I don't think the State has any further
17 exceptions.

18 MR. JOHNSON: I don't think I do either.

19 MR. HURVITZ: All right. Well, I'll begin with that
20 point then. And this will become more apparent when I take
21 exceptions to the Court's instructions. So why don't I do that in
22 the context of giving my exceptions, and I'll respond to the
23 State's argument at that time.

24 THE COURT: All right. Any exceptions or objections?

25 MS. REGAN: Yes, in terms of exceptions to the Court's

1 giving of instructions, we take exception to the last sentence in
2 Instruction Number 3. The shorthand for that is the abiding
3 belief sentence. I believe that that will take a jury further
4 away from rather than closer to an understanding of the standard
5 of proof beyond a reasonable doubt. I've seen in the pattern
6 instruction that sentence being in a bracketed portion. So it's
7 apparently optional. But my thought is if the purpose of
8 instructions is to clarify the law for the jury, the law is
9 clearer without that particular sentence in it.

10 THE COURT: All right.

11 MR. HURVITZ: Take exception to the giving of Instruction
12 Number 4, that's the direct and circumstantial evidence. We have
13 the evidence presented in seven-minute video. And, you know,
14 it's direct as the evidence can be. And I'm not quite sure what
15 the circumstantial evidence is that would be in question there.

16 Take exception to the giving of instruction Number 10. We
17 did not propose any definition of a building. But I would
18 suggest further that if the Court is going to give that
19 definition, and that would be in pattern instruction 2.05 that
20 the words of the pattern instruction, especially in a situation
21 like this, are not sufficient in the course of the testimony of
22 this case, Your Honor. The issue has certainly come up, and it
23 did at the conclusion of the State's case as to whether the fence
24 was completely uninterrupted. I cite the Court to the case of
25 State v. Engel 166 Wn.2d. 572, a 2009 case. It says: To qualify

1 as a fenced area the area must be completely enclosed either by
2 fencing alone or a combination of fencing and other structures.
3 That's going to be an issue of fact that the jury will have to
4 decide. And if the Court is going to give any definition of
5 building I think it has to include the language from the Engel
6 case.

7 THE COURT: What's instruction number 20?

8 MR. HURVITZ: 2.05, here I got it from the library here
9 if you need it.

10 THE COURT: I can find it. Go ahead.

11 MR. HURVITZ: The Engel case you'll find in the pocket
12 part.

13 THE COURT: Uh-huh.

14 MR. HURVITZ: Okay.

15 THE COURT: All right.

16 MS. HURVITZ: The defense takes exception to the Court's
17 Instruction Number 18 that's the to-convict instruction for
18 criminal sabotage for the reasons I indicated when we were
19 debating the instructions. We have a situation here where the
20 pattern jury instruction committee deigned not to have a pattern
21 instruction for criminal sabotage. The proposed to convict
22 instruction from the defense, which was defense proposed
23 instruction Number 13, essentially tracks the language of the
24 statute as opposed to reducing the alternatives, which is done in
25 instruction number 18. And I know we all wish there was a

1 pattern instruction that we could use. There is not. And we
2 wish that the legislature would not enact convoluted criminal
3 statutes but they did. But in any event, we're all stuck with
4 that problem. I don't think that we can pick and choose to try
5 to solve it.

6 Defense also takes exception to -- well, in conjunction
7 with that the special verdict on the criminal sabotage and also
8 with regard to Court's failure to give. Well, in conjunction
9 with this special verdict instruction, failure to give proposed
10 instruction 16 by the defense and failure to give the defense
11 proposed instruction 13, which is the defense option under to
12 convict instruction that tracks the statute. And just for the
13 record, the failure to give defense proposed instruction Number
14 14, that's the necessity defense. We understand and are mindful
15 of the Court's ruling on the motion in limine. But the Court of
16 Appeals has indicated that a ruling on a motion in limine does
17 not preserve the record. So by taking formal exception I do
18 preserve that. And the failure to give defense proposed
19 instruction 17 on climate change and defense proposed instruction
20 18 on the tar sands.

21 THE COURT: All right so noted.

22 MR. HURVITZ: I think I mentioned the special verdict
23 form, we take exception to failure to give the special verdict
24 form.

25 THE COURT: Okay. So noted. The exceptions and

1 objections are noted. The only ones I would comment on is the
2 definition of 2.5 I note from the WPIC that all of -- that's a
3 unique instruction because other than the beginning one-half
4 sentence that says (indistinguishable) in addition to ordinary
5 meaning all the rest of these instructions are bracketed, which
6 means they are all either included or deleted. And Mr. Johnson
7 just included the words fenced area, which again the State has
8 the burden of proof. So they can reduce or eliminate any of
9 those bracketed ones that they so desire.

10 I would still, although Mr. Johnson noted his objection, I
11 would still give the defense instructions on the lesser included.
12 The Peters case solves one of the problems. As I stated earlier,
13 there's a two-prong test determining whether an instruction is a
14 lesser included. The first is the elements have to be or the
15 lesser has to be necessary elements of the original charge, the
16 higher charge. That's the legal basis. And the second prong is
17 the evidentiary or factual basis where the facts and the evidence
18 in the case the facts have to line up enough to support an
19 inference that perhaps a lesser crime is committed. Peters has no
20 problem. It doesn't look like it. It says the State concedes
21 the first prong of the test was satisfied and that legally under
22 the legal analysis Trespass 2 is a lesser included of the Burg 2.
23 But the problem in that Peters case was that second prong was not
24 met, which is the evidentiary or the factual basis. And that
25 Peters case is factually different than all the others. The

1 Peters case deals with arrest. I think when you look at facts of
2 our case factually it does fit, and the second prong is met. So
3 I would allow defense to argue that the lesser included offense
4 of Criminal Trespass 2. Okay.

5 MR. JOHNSON: What about the issue of 1st Degree versus
6 2nd Degree.

7 THE COURT: Well, I thought about that, but I didn't --
8 I'm not the one who proposed the instructions. That's up to the
9 attorneys. That one wasn't proposed. So I am not one to throw
10 stuff in there.

11 MR. JOHNSON: All right.

12 MR. HURVITZ: And the question I have, Your Honor, is
13 with respect to the definition of building the Court's response
14 to holding an angle that says that the fenced area has to be
15 continuous and to include that in instruction.

16 THE COURT: No, I was going to go with the WPIC. I don't
17 add words to the instruction. I've never been wrong on that one
18 yet in 25 years.

19 MR. HURVITZ: Well, I understand, but as I say for the
20 record footnote 12.05 to the comments and on the building --

21 THE COURT: If the people who were devising the WPICs
22 would have felt that the continuity language should be necessary
23 that would be a very easy fix for them to include that in the
24 WPIC. They review those each year, and they haven't done that
25 yet. So I'm assuming its not high on their list. But I will

1 note your objection.

2 MR. HURVITZ: Thank you, Your Honor.

3 THE COURT: Okay. So we'll come back at 1:00. It will
4 take 10, 15 minutes to go over the instructions. We'll go right
5 to closing, and we'll have this in their hands fairly early in
6 the afternoon. All right. Thanks, everybody.

7 MS. REGAN: Your Honor, one quick note before we exit. I
8 intend to show some PowerPoint slides during my closing, mostly
9 of illustrative or demonstrative like a picture of what tar sands
10 oil looks like. Would you like to review those in advance?

11 THE COURT: That's okay. I'm interested myself. All
12 right. Thanks.

13 **(THE NOON BREAK IS TAKEN)**

14 THE COURT: Be seated. All right. Okay. In your hands
15 you have the jury instructions in this case. These are the
16 instructions for the State of Washington versus Kenneth ward.

17 **(THE COURT READS THE JURY INSTRUCTIONS)**

18 THE COURT: With those done please give your attention to
19 Mr. Johnson who will give you his concluding remarks on behalf of
20 the State.

21 Mr. Johnson.

22 MR. JOHNSON: Thank you, Your Honor. Good afternoon,
23 ladies and gentlemen. You've now heard all of the evidence that
24 you are going to hear in this case. That's been explained to
25 you. The rest is argument.

1 I would like to talk to you about a couple of your jury
2 instructions that we discussed that is the law contained in your
3 instructions. Specifically when the judge reads the kind of big
4 mass of information I'm going to pick out a few parts that I
5 think might be helpful to you. The first one is instruction one.
6 It says it's your duty to decide the facts in this case. It's
7 also your duty to accept the law from these instructions from the
8 judge. Regardless of what you personally believe the law is what
9 you personally think the law should be. So this is the law. And
10 you need to set aside any personal belief in order to make a
11 determination.

12 Another quick point in instruction one, you have nothing
13 whatever to think of any punishment that may arise that may be
14 imposed in the case of violation of the law. You may not
15 consider the fact that punishment may follow conviction except
16 insofar as it may tend to make you careful. I know you have been
17 careful. You have been paying attention and taking notes, and
18 this is a serious thing, and I'm sure that you will be careful.

19 So let's talk about the evidence and the charge of Burglary
20 in the 2nd Degree, instruction 7. To convict Mr. Ward of
21 Burglary in the 2nd Degree each of these elements must be proven
22 beyond a reasonable doubt. One, that on or about October 11th,
23 2016 the defendant entered or remained unlawfully in a building.
24 Well, first of all, instruction 10 tells you that a building in
25 addition to its ordinary meaning is a fenced area, includes a

1 fenced area. And I'll show you on Exhibit 2, (indistinguishable)
2 this area all the way around. You heard testimony from Deputy
3 Wilhonen and Kinder Morgan employees this is entirely fenced and
4 secured, locked, signed. You've seen pictures of the locks and
5 the sign. You saw the video with Deputy Wilhonen and Mr. Ward
6 first made contact up here and walked all the way up to here to a
7 gate, and that constitutes a building.

8 Entered or remains unlawfully, well, you heard testimony from
9 Kinder Morgan that he did not have permission to be there. This
10 was a locked facility. You saw him take the bolt cutters, clip
11 the padlock to get in, not indicative of somebody to be
12 somewhere. I'll point out also with these cutters, and a lot of
13 this equipment, this bag, these cutters this is brand new stuff.
14 This isn't tools like my dad has in the back of a pickup that are
15 used, covered in dust, and rusted and greased. These were bought
16 for this purpose. This was a planned event, as Mr. Ward
17 testified.

18 So he entered or remained unlawfully, that was shown beyond
19 a reasonable doubt of the evidence. He's entering or remaining,
20 which was number 2, when a witness [sic] intends to commit a
21 crime against person or property therein. Now, what did Mr. Ward
22 testify to? Why did he go there? He went there with the intent
23 to shut down a pipeline, to close the main block valve, and
24 that's precisely what he did That was his intent going there.

25 There is also an inference instruction that you can infer

1 that someone intends to commit a crime when they enter
2 unlawfully, but he cleared that up for us and said yeah, that's
3 what I wanted to do. This is not a criminal trespass case,
4 ladies and gentlemen. This is a burglary case. Burglary is the
5 appropriate charge. Had he gone in there with the intent to sit
6 down and peacefully protest just by his presence we might have a
7 different story. No crime sitting down or holding up a sign to
8 shut it down. He went there with the intent to close that valve,
9 and he did that. That's the distinction that's important.

10 The third element is this occurred in the State of
11 Washington. I think we can all agree on that.

12 Number 8 instruction says a person acts with intent or
13 intentionally when acting with the objective or purpose to
14 accomplish the result that constitutes a crime. That's precisely
15 what Mr. Ward did. He went there with the intent of theft of
16 sabotaging that pipeline of shutting it down, without permission,
17 without consent. Yes, they called ahead. They didn't call ahead
18 and say is it okay if we went in and did this? They said we're
19 doing this, and we're shutting it down in 10 minutes, 15 minutes.
20 So that doesn't exactly result in permission. That is happening.
21 And the whole pipeline company was left to make a choice do we
22 need to shut this down, and they ultimately did with four
23 refineries. They shut it down for four hours because of what Mr.
24 Ward did. That is sabotage.

25 So let's talk about sabotage. Instruction 18 tells us to

1 convict the defendant of the crime of criminal sabotage each of
2 the following elements must be proved beyond a reasonable doubt
3 that on or about October 11th, 2016, with the intent that his act
4 shall interfere with, interrupt, impair, or obstruct the owner's
5 or operator's control of any transportation enterprise, private
6 business, or commercial enterprise, wherein any person is
7 employed for wage. We know that Kinder Morgan employed people for
8 a wage. Mr. Davis and Mr. Odens testified to that. So they
9 qualify as, quote, a commercial enterprise.

10 Did Mr. Ward intend to interfere with, interrupt, impair,
11 or obstruct an owner's or operator's control of transportation
12 enterprise? Of course he did. He wanted to shut it down.
13 Everything we heard about it, his reasoning before it, while
14 interesting, isn't really relevant because the fact is that's
15 what he intended to do. He did exactly what he set out to do. It
16 did interrupt business for over four hours. There was no flow
17 for over four hours.

18 The defendant did unlawfully (indistinguishable) take
19 possession or control of any property, instrumentality, machine
20 mechanism, or appliance used in such business enterprise. We saw
21 the video. Mr. Ward testified he shut the main block valve. You
22 saw him shut the main block valve, turning it, or that he cut the
23 locks off it and another valve, turned it, put his own chain,
24 brand shiny new chain, brand new lock on it, and then stuck the
25 sunflowers on it. That constitutes taking possession unlawfully.

1 He didn't have permission to do it. He took control of it, and he
2 took such control that he locked it to exclude the owners from
3 even having control of it unless they took his lock off. So that
4 element has been more than satisfied by the evidence, by the
5 video, by Mr. Ward himself who testified. This act occurred in
6 the State of Washington.

7 Mr. Ward's own words are interesting. He was aware that
8 the consequence could be severe. He knew what he was doing. He
9 went there to shut down or attempt to shut down the tar sands
10 flow. He and his cohorts at the Climate Disobedience Center
11 decided to take action to directly address what they perceived to
12 be a problem. Nothing in your jury instructions tells you -- as
13 long as you have a plan or a good reason, or a strong belief you
14 can disregard the law. That's not how this works, and that's not
15 what he did. It's an explanation but not an excuse.

16 I would ask you that based on the evidence to find Mr. Ward
17 guilty of Burglary 2nd Degree and Criminal Sabotage. Thank you.

18 THE COURT: Thank you, Mr. Johnson.

19 Ladies and Gentlemen, Ms. Regan.

20 MS. REGAN: Thank you, Your Honor.

21 Ladies and Gentlemen, I will start where I began at opening
22 statements, which is global warming is the most pressing issue of
23 our time. I put this chart up for Mr. Ward, and he talked to you
24 that this was one of the things that he researched, that he
25 learned about, that influenced his decision making process on

1 what he thought he needed to do with regard to climate change.
2 Climate change or global warming is a process by which rapidly
3 increasing temperatures will cause disruptions to the planet's
4 atmospheric system. This is science. This is fact. We also know
5 for a fact that it's caused by combustion. It's caused by the
6 combustion of fossil fuels like tar sands oil, gas, coal. And
7 it's caused by greenhouse gases escaping into the air, and
8 because of that we now have rates going off the charts. In fact,
9 just since January our global temperatures have gone up four more
10 degrees in just six months.

11 Worldwide greenhouse gas emissions must be reduced
12 significantly below the current levels to avert what scientists
13 call catastrophic climate change. Scientists use that word
14 catastrophic. The effects of climate change on Washington sea
15 levels rising, warmer temperatures, extreme weather, reduced snow
16 back, negative impacts on human health. This chart will be going
17 back to the jury room with you. I'm sure some of you maybe
18 you'll be able to find your own home on this map or those of your
19 family members.

20 The scientific evidence is clear that the current rates of
21 reduction cannot achieve the greenhouse gas reduction necessary
22 to protect the environment and to maintain a stable climate
23 system. Again, that's the chart that you will have back in the
24 jury room.

25 The US is the largest producer of fossil fuels on earth.

1 And we alone are responsible for one third of all the carbon in
2 the atmosphere right now. And despite that fact we just had our
3 president withdraw us from the Paris Climate Accord, a nonbinding
4 agreement where every single country except for Syria agrees that
5 those were steps we needed to take to avert catastrophe.
6 Nicaragua was another country that withheld from it, but only
7 because they didn't think it went far enough.

8 We also know that one of the motivations was basically sell
9 off our country to large corporations that are making profits off
10 tar sands and coal. Tar sands, this is a picture of Alberta
11 Canada. On the left is before. On the right is after. This is
12 the Boreal Rainforest, a unique place on the planet. And
13 corporations like Kinder Morgan came in and turned it into this.
14 This is tar sands mining in Alberta, Canada, the largest
15 contributor to global warming on the planet.

16 This is tar sands. At the beginning I mentioned it was
17 kind of sludgy and kind of hard to put through pipe. This is
18 what tar sands looks like. And although it might be a little hard
19 to see on this map every one of those colored lines that you see
20 there are pipelines, pipelines going across every part of our
21 country, pipelines carrying tar sands oil, carrying natural gas.
22 And where is the Trans Mountain Pipeline going? It crosses your
23 land and then sends those resources off to China. The benefit of
24 those energy sources aren't benefiting you in Washington, or me
25 in Oregon, or even any of us in the United States.

1 MR. JOHNSON: Your Honor, I'm going to object. This
2 assumes facts not in evidence.

3 THE COURT: Sustained.

4 MS. REGAN: It's argument.

5 MR. JOHNSON: It's testimony.

6 THE COURT: Sustained as to testimonial argument.

7 MS. REGAN: This is the Kinder Morgan pipeline. As you
8 can see the little yellow line that is at the bottom it goes down
9 into your neck of the woods. Kinder Morgan is a bad neighbor, a
10 bad citizen. They are destroying the future for your children
11 and your grandchildren.

12 Ken Ward testified about his background, what he has done
13 with his life, how much time, and energy, and resources he has
14 spent in trying in legal ways to affect climate change prevention
15 in order to keep the planet from hitting that tipping point. As
16 you heard his father was a chemistry professor. As you heard one
17 of the main sources of information that he learned about was Dr.
18 James Hansen, a preeminent climate scientist. He's the leading
19 scientist hired by our own government to monitor and tell us what
20 the state of the atmosphere and our oceans are. He's the
21 scientist that wrote that paper called The Tipping Point. And he
22 argues that if he didn't take serious steps in the courts our
23 future generations would never be able to recover from our
24 actions or our failures to act. He mentioned that he worked for a
25 public interest research group; that he had worked for non-profit

1 organizations, including the climate disobedience center.

2 He told you that one of the pivotal moments in his career
3 was the birth of his son, Eli, who is 17. He talked to you about
4 how that changes the scope of time for most parents. All of the
5 sudden your life is not ended at the time that you die, but it's
6 ended at the time of your child, your grandchildren, even your
7 great grandchildren. How selfish of us to be thinking that time
8 only reflects our lifespans. We have a duty. Mr. Ward testified
9 that he was reluctant that he was concerned; that he took the
10 decision to act very, very, very seriously.

11 He also mentioned that he had worked his whole life without
12 going to jail, without getting arrested, that he had shut down a
13 coal plant on the east coast; that he had engaged in civil
14 disobedience that ultimately resulted in Shell Oil deciding not
15 to take oil and gas out of the Arctic. So he had decided to
16 combine the academic research, the legislative work, the
17 politics, and combine it with direct action, or civil
18 disobedience, a history that our country holds very close. His
19 plan was to shut down all of the tar sands oil that flowed from
20 Canada into the US. And he did so with a group of elders, a group
21 of four other people all over the age of 50, a lawyer, a computer
22 expert, a therapist. These weren't people that made a snap
23 decision and decided to runoff and lockdown to something. This
24 was something that they conscientiously thought about. They tried
25 all sorts of different options. They didn't sneak around. They

1 didn't lie about what they were doing. You even heard that part
2 of the reason that they live streamed it was to make sure the
3 pipeline companies could see what they were doing out there.
4 They weren't there to damage property. They weren't there to
5 steel anything. They weren't there to harm anyone. In fact,
6 just the opposite. They were there to prevent harm. They weren't
7 there to commit burglary, to commit sabotage. The action ended up
8 being successful for four hours.

9 Now, the judge told you that the State has the burden of
10 proof, and that burden of proof is reasonable belief, reasonable
11 doubt, sorry, or abiding belief. Abiding belief is something
12 that is going to last; that is lifelong; that is enduring or
13 surviving. In Oregon we call it morale certainty, a jury has to
14 come to a morale certainty about whether or not each and every
15 element of these crimes has been proved beyond a reasonable
16 doubt. We want you to hold the State to that burden. We think
17 that the State has overcharged in this case; that they have
18 overreached.

19 MR. JOHNSON: Objection, Your Honor.

20 MS. REGAN: We also think --

21 THE COURT: Overruled, argument.

22 MS. REGAN: We also think that words mean something, when
23 someone is charged with murder means they actually killed a
24 person. The words of a crime someone commits actually means
25 something. A crime only a corporation can bring against a

1 citizen like sabotage is that what Ken Ward did? Or did he
2 respectfully temporarily attempt to push back against the big
3 bully.

4 MR. JOHNSON: Objection, Your Honor. The corporation
5 didn't bring charges.

6 THE COURT: Sustained. The jury has heard the facts.

7 MS. REGAN: During the opening I mentioned what would you
8 do if your neighbor's house was on fire. Last night I was
9 driving around in some of Skagit County's farmlands, and I
10 thought of a better analogy, which is two farmers live next to
11 each other, and they irrigate their crops, and a corporation
12 moves on to one of those farmlands and starts pumping all of the
13 water out of the aquifer so that the other farm no longer has
14 water to irrigate, and the crops begin to dry up, how long would
15 it take before one of those farmers, one of those neighbors just
16 walked onto that other farm and turned off the valve that brought
17 water to the surface. What would it take for someone to finally
18 say enough is enough. I can simply turn it off. What they are
19 doing isn't right. What they are doing is harming my family, my
20 community, the plant. How did we come to a point where an act
21 like that can be labeled sabotage by a corporation.

22 I also started off by talking about history and civil
23 disobedience. Mr. Ward himself talked about the Boston Tea
24 Party, talked about the abolitionist movement, times where people
25 broke the law in order to change things for the future. Would we

1 still have slavers if the abolition movement hadn't broken the
2 law and smuggled humans to other countries. Would the civil
3 rights and voting era would everyone have the right to vote,
4 women, people of color.

5 And then there was the Boston Tea Party, which almost every
6 child in America learns about in school before the Declaration of
7 Independence there were these 13 colonies ruled by the king of
8 England. From across the ocean the king imposed a tax on tea, a
9 tax that caused financial separating to the colonists and put a
10 bunch of money in the pocket of the king. The settlers were
11 struggling. They were angry about it. They saw there was nothing
12 they could do to try and stop what they thought was unfair.
13 Until one night when a group of normal people rode their horses
14 down to the Boston Harbor. They boarded that boat, without
15 permission, they stole tea out of the ship and threw it into the
16 ocean destroying property. Of course they didn't have live
17 stream, like we had in this case, and you will have the video to
18 watch as many times as you would like back in the jury room.

19 Now, the king and his government were furious at this.
20 They despised the very idea that regular people actually thought
21 that they could take action; that the colonists do something to
22 stop their own suffering. And that the government that was
23 thousands of miles away and no ability to watch every ship or
24 every case of tea that existed. They wanted to bring the power of
25 the state, it's jails, it's prosecution's, it's punishments down

1 on the heads of those courageous men, brothers, neighbors. As
2 far as we know there were no women at that point engaged in civil
3 disobedience.

4 But the state proclaims that those people were criminals.
5 They entered property without permission. They stole. They
6 damaged property that wasn't there's. The sovereign wanted
7 everyone to believe that they were criminals just like the
8 sovereign in this case. But the neighbors and townspeople didn't
9 think that they were criminals. They knew that those people
10 engaged in a brave act on their behalf. And with time we too have
11 come to believe that those people were something other than
12 criminal. In fact, our history books call their act of civil
13 disobedience heroic. They are called patriots. Ken Ward and the
14 other four people who took this great risk in the hope of a
15 better future for all of us are also patriots. They did what they
16 thought they could to stop the largest source of carbon pollution
17 on the planet. Maybe it was only for a few hours. But like the
18 Boston Tea Party their act was symbolic. It told the
19 multinational corporations the industries that put profits over
20 human health, over our survival it told these powerful men who
21 lived far away from the mines and far away from those pipelines
22 that people retain the power to defend their lives; that we the
23 people can stop the senseless greed and lust for money. That
24 your neighbors, normal people, smart people, people with
25 families, and careers can simply cut a lock, and turn a valve,

1 and take one small step toward energy independence. Just like
2 those colonists boarded a boat threw some bags of tea into the
3 ocean, and took one small step towards independence for all
4 future generations.

5 Now, the judge has told you about what the jury's role is,
6 and in a constitutional system of justice like ours there is a
7 judicial body called the trial jury that has more power than
8 Congress, than the President, even in the Supreme Court in
9 certain circumstances. The trial jury is protected under our
10 constitution and the average citizen has power to keep the
11 government in check. For centuries juries have been called upon
12 to do the right thing. Our basic civics classes teach us that the
13 jury is a shield between the sovereign and the people. The main
14 thing a jury has to do is the right thing. And as jurors in our
15 system of justice you are brought in to evaluate the evidence in
16 this case. You're allowed to make reasonable inferences. The
17 judge told you you're allowed to use your common sense.

18 We're not asking that you agree with what Ken Ward did. And
19 you're not here to simply judge whether his act was right or
20 wrong. You're role is to determine whether the charges brought by
21 the straight in this instance do, in fact, fit the crime that
22 he's been charged with performing. You don't have to fit a square
23 peg into a round hole. If after considering the facts you don't
24 believe that the sovereign has proved to you beyond a reasonable
25 doubt that what Mr. Ward did was sabotage or burglary you simply

1 come back with a not guilty verdict. You are a jury of Mr. Ward's
2 peers. You are the morale compass of your community. You have
3 the right to exercise common sense, and we ask that you come back
4 with a verdict of not guilty to both charges.

5 Now, when I sit down my voice will become silent, and the
6 Prosecutor has another chance to get up and speak to you because
7 of that burden of proof that he carries. So I expect him to get
8 up and try to understate what I've just explained to you, but we
9 know that you have paid attention. Mr. Ward has complete faith in
10 you as a jury of his peers that you will give him fair trial.
11 Thank you very much for all of your time. We know that you all
12 have given us your lives for a couple of days to be part of this
13 process. We thank you.

14 THE COURT: Thank you.

15 Ladies and Gentlemen, Mr. Johnson is entitled to a brief
16 rebuttal.

17 Mr. Johnson.

18 MR. JOHNSON: Thank you, Your Honor.

19 The Defense has tried to distract you, to frighten you, to
20 make you think about something other than the acts
21 (indistinguishable). Don't be distracted.

22 What gives Mr. Ward this privilege that he can come here
23 from Oregon in his Jeep, seems a little hypocritical given the
24 fossil fuel discussion, break into a facility, turn off a valve,
25 shut down a pipeline, and walk away? Because he knows better,

1 because he decided, his friends decided, they know better. We
2 need to go up there because those people can't figure this out.
3 We have to (indistinguishable). Don't be distracted. Farmers are
4 fighting for water in this County. They are doing it legally.
5 Mr. Ward's actions put others at risk because he knew better. He
6 can go mess with that valve. Remember Mr. Woodard's testimony.
7 Mr. Woodard is the Director of Environmental Services for the
8 Samish tribe. He understands these issues. He's concerned. He
9 has children. Lots of people in that neighborhood have children.
10 He's worried about this. Kinder Morgan is not on trial. They
11 can say they are bad, tar sands are bad, and all these things.
12 But that doesn't mean Mr. Ward should not be held accountable.

13 Now, the defense in their statement talked about
14 accountability. They want accountability. The State is asking
15 for accountability for Mr. Ward to respect the laws of this
16 County of this State and all of us. When he doesn't he understood
17 the risk. He needs to be held accountable. The State asks that
18 you find him guilty of Burglary 2nd Degree and Criminal Sabotage.

19 THE COURT: Thank you, Mr. Johnson.

20 All right, Ladies and Gentlemen of the jury, the attorneys
21 have finished their jobs. And now it is time for you to
22 deliberate and complete your job. The first thing is first.
23 Let's pick the alternate.

24 THE CLERK: Juror Number 1, Gerald Miller.

25 THE COURT: Mr. Miller, you are the alternate. When the

1 jury goes back into the back room give Kelly your cell phone
2 number or your telephone number, and she will call you when the
3 case is resolved. I'm sure you are interested. She will call
4 you and give you the result. When she gives you that call you
5 can then be released from the instruction to not discuss the case
6 and talk about it with anybody you would like. Thank you very
7 much for being here with us.

8 Let's swear Kelli in while we're at it.

9 **(THE BAILIFF IS SWORN IN)**

10 THE COURT: Okay. In just a second I'm going to have you
11 the 12 members of the jury retire to the jury room and begin
12 deliberations. When you do go back there we're going to send
13 back with you five tools to help you, number one will be your
14 notes, and I think they are already back there. It was a
15 relatively short trial, and some of you may have taken notes. If
16 you have, Kelli has the book.

17 Number 2, will be the jury instructions you each have a
18 copy in your hand. Those are your own working copies. You can
19 write on those, tear them up, whatever you want to do. Also in
20 Kelly's hand is a notebook. That is the original copy of the
21 jury instructions. That should go to the presiding juror. That
22 has the verdict forms in it. Don't write on those. Those need
23 to be kept in their pristine state when the time comes to deal
24 with the verdict form.

25 The third tool is the exhibits. There have been several

1 exhibits admitted, and they will go back to the jury room with
2 you.

3 The fourth tool your collective memories. There's 12 of
4 you. That's a lot of good memory cells.

5 And five your common sense. I'm not going to tell you how
6 long or short a period of time you should take to deliberate. I
7 know you will give this case due consideration and due attention.
8 So we'll leave it at that. And no matter how long or short a
9 period of time you take if you are finished by the end of the day
10 great. If not, there's always tomorrow. So don't feel rushed.
11 And I would release you at 4:30 today, even though you would
12 still be in deliberations and just bring you back tomorrow. I'll
13 still get you out of here by 4:30.

14 All right with that you may retire to the jury room and
15 commence talking about the case with a view towards reaching a
16 verdict. You may be excused.

17 **(JURY IS EXCUSED TO BEGIN DELIBERATIONS)**

18 THE COURT: All right. Be seated.

19 Thank you, Mr. Miller. You take care. Good to see you.

20 Counsel if you would please give your cell phone numbers to
21 Kelli. If you are going to be around or exit the building for a
22 while so we can get a hold. If the jury is still deliberating at
23 4:25 I'll bring them out and excuse them. You don't have to come
24 back. Most of the time the attorneys I tell them to -- caution
25 them not to discuss the case with anybody, get some rest, and

1 bring them back tomorrow at 9:00 to start deliberations again,
2 and cut them loose. Okay. Thank you all for your courtesy and
3 your professional. See you in a little while.

4
5 **(PROCEEDINGS ENDING AT 2:01 P.M.)**
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1 STATE OF WASHINGTON)

2) ss: C E R T I F I C A T E

3 COUNTY OF SKAGIT)

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7 I, JENNIFER CHRISTINE POLLINO, Official Court Reporter
8 in and for the County of Skagit do hereby certify;

9
10 That the foregoing is a true and correct transcript of
11 the proceedings held on January 24, June 5 and June 6, 2017.

12
13 Witness my hand on this 2017.

14
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18 _____
19 JENNIFER CHRISTINE POLLINO,
20 WA CCR #2221, CA CCR #10176, RPR,
21 Official Court Reporter
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FILED
SUPREME COURT
STATE OF WASHINGTON
1/4/2021 12:04 PM
BY SUSAN L. CARLSON
CLERK

APPENDIX F

Defense Motion to Allow Affirmative Defense and to Call Expert
Witnesses at Trial, *Washington v. Taylor* (Spokane Co. Dist. Ct., Wash.,
No. 6z117975, July 11, 2019)



IN THE DISTRICT COURT OF THE STATE OF WASHINGTON FOR
SPOKANE COUNTY

STATE OF WASHINGTON ,
Plaintiff,

GEORGE TAYLOR,
LEWIS NELSON,
GAEA MAEVE AEOLUS,
NANCY NELSON,
MARGARET HELLER,
DEENA ROMOFF,

Defendants

No. 6Z0117975
6Z0117976
6Z0117977
C00014935
C00014936
C00014937

DEFENSE MOTION TO ALLOW
AFFIRMATIVE DEFENSE AND TO
CALL EXPERT WITNESSES AT TRIAL

I. RELIEF REQUESTED

Defendants Nancy Nelson, Deena Romoff, Margie Heller, Rev. George Taylor, Lewis Nelson and Maeve Aeolus, by and through the undersigned attorney, respectfully move the Court to permit the Defendants, individually and jointly, to present the affirmative defense of Necessity and to call expert witnesses in their case in chief to provide testimony in support of that defense.

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY AND DISTRICT OF SPOKANE

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF
THE ORIGINAL AS THE SAME APPEARS OF RECORD.

DEFENSE MOTION TO ALLOW AFFIRMATIVE
DEFENSE AND TO CALL EXPERT WITNESSES
AT TRIAL - Page 1

DATED THIS 15 DAY OF June 2017

BY

CLERK

Eric M. Christensen
2718 W. Gordon
Spokane WA 99205
509-389-0925

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II. STATEMENT OF THE ISSUES

1. Should the Court allow the Defendants, individually and jointly, to present the affirmative defense of necessity at trial?

2. Should the Court allow the Defendants, individually and jointly, to call expert witnesses to provide testimony in support of the defense of necessity?

III. STATEMENT OF THE FACTS

This case involves six defendants dedicated to fighting for the health of our planet and the well-being of fellow citizens. In August and September of 2016, these six defendants are charged with going onto the property of Burlington Northern Santa Fe (herein "BNSF") to block a rail line. The evidence will show that they reasonably believed that by literally putting their bodies on the line, they would move the world closer to dealing with the urgent issues the oil and coal train corridor through Spokane presents to global climate change and the health and safety of our local communities.

All actions by the defendants arose out of a deeply-held belief that urgent action was necessary to avoid the greater harms to the safety of the communities living along the route of the trains and the impact of fossil fuel use on the very future of our planet. They believed that after all of their previous efforts, there was no legal alternative to their actions.

The criminal complaints against the named defendants alleges Obstructing or Delaying a Train (RCW 81.48.020) and Second Degree Criminal Trespass (RCW 9A.52.080). No property was damaged.

At around 11:00 am on August 31, 2016, Nancy Nelson, Deena Romoff, and Margie Heller, members of the group Raging Grannies, along with approximately two dozen other protestors,

1 are alleged to have walked onto the train tracks owned by BNSF, located near the intersection of
2 N. Crestline St. and E. Trent Ave., Spokane, Washington. At around 5:00 p.m. on September 29,
3 2016, Rev. George Taylor, Rusty Nelson, and Maeve Aeolus, members of the group Veterans for
4 Peace, similarly are alleged to have walked onto the train tracks at the same location. This
5 stretch of track emerges from the Spokane railyard, where BNSF trains are routed westbound to
6 various customers, including the oil refineries and coal and oil shipment facilities in Port
7 Westward, Oregon, Tacoma, Anacortes and Cherry Point, Washington, and British Columbia. The
8 allegations are that on both dates, defendants along with dozens of supporters lined the rail
9 tracks, held up signs, chanted, and unfurled large banners protesting rail transport of coal and
10 oil. Journalists circulated and interviewed various supporters.

11
12 Testimony is expected to show that BNSF officers were alerted to the presence of the
13 protestors, and contacted City of Spokane law enforcement. During both protests, about a dozen
14 private and public law enforcement officers were present. All protestors were asked to leave,
15 and on both occasions all but three complied. A BNSF officer informed the defendants that if
16 they did not move from the property, they would be subject to arrest. Defendants refused, and
17 they were then arrested without incident. The protests lasted approximately two hours, from
18 about 11:00 AM to about 1:00 PM on August 31, and from about 5:00 PM to about 7:00 PM on
19 September 29. It is anticipated that all testimony will indicate that all defendants were polite and
20 peaceful. Defendants were transported to the Spokane County Jail by Spokane police, where all
21 six defendants were charged and released.
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2 **IV. ARGUMENT**

3 **A. INTRODUCTION**

4 Washington district courts have long recognized that the greater good for society may be
5 accomplished through violations of the literal language of our criminal code, and have recognized
6 the defense of necessity. As will be shown at trial, all six defendants have significant personal
7 histories of commitment to climate justice and the welfare of Spokane. Together, they took this
8 measure as a necessity where they reasonably believed there was no legal alternative to spur
9 action by federal, state, and local government on an issue that has seen almost no progress in the
10 last decade, i.e., the transport of fossil fuels to destinations where they will be combusted and
11 contribute to atmospheric carbon dioxide, the primary cause of global climate change.
12

13 The United States is a nation that is literally founded on non-violent civil disobedience done
14 for the purpose of a greater good. In Washington state, our citizens have used non-violent civil
15 disobedience to demonstrate for causes as diverse as nuclear arms nonproliferation and against
16 the Apartheid regime of South Africa. As a country, great strides in justice have occurred because
17 of civil disobedience. From the Revolutionary War to the Underground Railroad, to the lunch
18 counters in Birmingham, civil disobedience has been at the heart of many of our nation's
19 struggles for justice.
20

21 **B. A CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO PRESENT AND CONTROL HIS /
22 HER OWN DEFENSE.**

23 The Constitution affords a criminal defendant the right to present a complete defense. See
24 *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). A
25 defendant in a criminal case, likewise, has a constitutional right to present a defense consisting of

1 relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 842
2 P.2d 651 (1992). Evidence that has "any tendency to make the existence of any fact that is of
3 consequence...more probable or less probable than it would be without the evidence" is relevant
4 evidence. ER 401. Likewise, the threshold to admit relevant evidence is very low—"even
5 minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189
6 (2002).

7
8 When considering the applicability of an affirmative defense, a defendant must offer
9 sufficient admissible evidence to justify giving the instruction on the defense. *State v. Janes*, 121
10 Wn.2d 220, 237, 850 P.2d 495 (1993). In evaluating the sufficiency of evidence supporting a jury
11 instruction on the affirmative defense, the court must interpret the evidence most strongly in
12 favor of the defendant. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009) (citing *State v.*
13 *Janes* 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). Moreover, the trial court must not invade the
14 exclusive province of the jury by either weighing the proof or judging the credibility of proffered
15 witnesses. *Id.* The Court must instruct the jury on the defendant's theory of a case where it is
16 supported by the evidence. *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (1972). Failure
17 to do so is reversible error. *Id.*

18
19 **C. THE AFFIRMATIVE DEFENSE OF NECESSITY HAS A RICH HERITAGE IN WASHINGTON STATE.**

20 Washington has long recognized the common law of necessity as an affirmative defense to
21 various crimes. See, e.g. *State v. Diana*, 24 Wn. App. 908, 917, 604 P.2d 1312 (1979) (collecting
22 common law necessity defense cases); see also e.g., *State v. Jeffrey*, 77 Wn. App. 222, 226, 889
23 P.2d 956 (1995) (recognizing necessity as a defense to unlawful possession of a firearm case).¹
24

25 ¹ While Washington courts have not officially recognized the necessity defense in civil disobedience
DEFENSE MOTION TO ALLOW AFFIRMATIVE
DEFENSE AND TO CALL EXPERT WITNESSES
AT TRIAL - Page 5

1 The defendant bears the burden of proof in asserting the affirmative defense to show, by a
2 preponderance of the evidence, that 1) the defendant reasonably believed that the commission of
3 the crime was necessary to avoid or minimize a harm; 2) the harm sought to be avoided was
4 greater than the harm resulting from a violation of the law; 3) the threatened harm was not
5 brought about by the defendant; and 4) no reasonable legal alternative existed. See WPIC 18.02
6 Necessity—Defense

7 A trial court must allow an instruction on a defendant's theory if the law and the evidence
8 support it. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956, rev. den., 142 Wn.2d 1004, 11
9 P.3d 825 (2000). In evaluating whether the evidence will support a jury instruction, the trial court
10 must interpret the evidence most strongly for the defendant. The jury, not the judge, must weigh
11 the proof and evaluate the witness' credibility. *May*, 100 Wn. App. at 482. If there are justifiable
12 inferences from the evidence upon which reasonable minds might reach conclusions that would
13 sustain a verdict, then the question is for the jury, not the court. *Moyer v. Clark*, 75 Wn.2d 800,
14 803, 454 P.2d 374, 376 (1969).

15 Here, the defendants will provide evidence to support their theory of the case, including
16 their own testimony and that of expert witnesses. First, the defendants themselves will testify
17 that they reasonably believed that their actions were necessary in order to avoid or minimize the
18
19

20
21 cases, district courts have allowed criminal defendants to raise necessity as a defense in peaceful
22 protest cases. See William Quigley, "The Necessity Defense in Civil Disobedience Cases: Bring In the
23 Jury," 38 New Engl. L. Rev. 1 (2003), discussing *Washington v. Heller* (Seattle Mun. Ct. 1985) (eight
24 doctors acquitted of trespass charges for anti-apartheid protests staged on the porch of the home of
25 South African consul); *Washington v. Bass*, Nos. 4750-038, -395 to -400 (Thurston County Dist. Ct.
April 8, 1987) (Evergreen State College students acquitted of trespass charges following sit-in at the
Washington State Capitol in support of an anti-apartheid disinvestment bill); *Washington v. Karon*, No.
J85-0036-39 (Benton County Dist. Ct. 1985) (four defendants blockaded a federal plutonium-uranium
extraction facility at the Hanford Nuclear Reservation; case dismissed).

DEFENSE MOTION TO ALLOW AFFIRMATIVE
DEFENSE AND TO CALL EXPERT WITNESSES
AT TRIAL - Page 8

Eric M. Christensen
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509-389-0925

1 drastic and immediate harms of global climate change and to minimize the threat to public
2 health and safety posed by the transportation of volatile coal and oil through our city.

3 Second, the defendants will offer testimony and documentary evidence of their previous
4 efforts to redress their grievances through traditional channels, including but not limited to
5 political activism, petitioning the government, founding and supporting community sustainability
6 groups, participation in peaceful marches, membership in and support of environmental groups
7 such as the Sierra Club, authoring letters to the editor of local newspapers, and addressing
8 community councils on energy, climate and economic issues.

9
10 With respect to the nature of the greater societal harm the defendants sought to avoid or
11 minimize, the defendants will call expert witnesses. These witnesses will speak directly to the
12 costs, harms and threats posed by climate change, including testimony related to local impacts,
13 and the significant safety impacts associated with transport of coal and oil by train.

14 Finally, the expert witnesses, in conjunction with the testimony of the defendants, will
15 speak to the question whether any reasonable legal alternative existed, with the resounding
16 answer being that no, it did not.

17 The rationale of the necessity defense is rooted in public policy. Washington courts
18 acknowledge that, "the law ought to promote the achievement of higher values at the expense of
19 lesser values, and sometimes the greater good for society will be accomplished by violating the
20 literal language of the criminal law." *State v. Bailey*, 77 Wn. App. 732, 740, 893 P.2d 681, 685
21 (1995) (quoting Wayne R. LaFare & Austin W. Scott Jr., *Criminal Law* § 50, at 382 (1972)). Such
22 judicial recognition provides a logical nexus for application of the affirmative defense of necessity
23 in civil disobedience cases.

1 **D. THE CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE INCLUDES THE RIGHT TO**
2 **CALL WITNESSES.**

3 The right to offer the testimony of witnesses, is in plain terms the right to present a
4 defense, the right to present the defendant's version of the facts as well as the prosecution's to
5 the jury so it may decide where the truth lies. See *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct.
6 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35
7 L.Ed.2d 297 (1973). "Just as an accused has the right to confront the prosecution's witnesses for
8 the purpose of challenging their testimony, he has the right to present his own witnesses to
9 establish a defense." *Washington v. Texas*, 388 U.S. at 19. This right is a fundamental element of
10 due process of law, "which the courts should safeguard with meticulous care." *State v. Burri*, 87
11 Wn.2d 175, 181, 550 P.2d 507 (1976), citing *Feguer v. United States*, 302 F.2d 214, 241 (8th
12 Cir.), cert. denied, 371 U.S. 872, 9 L.Ed.2d 110, 83 S.Ct. 123 (1962)).

13 Some federal circuits have excluded the use of the necessity defense as a matter of law.
14 E.g., *United States v. Schoon*, 197 F.2d 193 (1992). But Washington has only limited use of the
15 defense by statute.² There is no statutory prohibition to use of the defense in criminal trespass
16 proceedings, and no case that denies the defense to political protestors as a matter of law.

17 Here, the defendants intend to call expert witnesses—either to testify to the effects of
18 climate change and its associated harms, or to offer testimony regarding issues of train/railroad
19 safety and the significant societal harms associated with the transport of volatile crude oil and
20 coal through Spokane. The expert witnesses' testimony is admissible as it will assist the trier of
21 fact in understanding the evidence presented. ER 702.
22

23
24 ² For example, the defense is not available for ball jumping, RCW 9A.76.172(2), escape first and second degree,
25 RCW 9A.76.110(2) and .120(2), and eluding, RCW 46.61.024(2)(a).

2
1 **E. ANTICIPATED TESTIMONY AT MOTION HEARING, AND AT TRIAL**

2 The defense intends to call the following experts, first at the Motion Hearing to allow the
3 Necessity Defense, then at trial: 1) Dr. Fred Millar; 2) Dr. Steve Running; and 3) Prof. Tom
4 Hastings.

5 A brief statement of qualifications and summary of the anticipated testimony of each
6 witness follows.

7 **Summary of anticipated testimony of Dr. Fred Millar.**

8 Dr. Millar is a recognized international analyst in nuclear waste storage and transportation
9 and industrial chemical RISK, transportation and accident prevention, emergency planning and
10 homeland security, including crude oil transport. He has served as consultant to major U.S.
11 chemical and oil worker unions, environmental groups, insurance companies and governmental
12 bodies including the District of Columbia Council. He has been instrumental in designing and has
13 testified to Congress regarding hazardous materials safety and community right-to-know laws.

14 Dr. Millar will testify regarding the substantial and imminent dangers associated with the
15 transportation of Bakken crude oil by rail through Spokane. Specifically, Dr. Millar will testify
16 about safety problems such as the length of trains, inadequacy of oil car safety features, train
17 speed and routing, volatility of Bakken crude oil, and the frequency and risk of accidents. Dr.
18 Millar will testify about the specific dangers associated with elevated train tracks and proximity to
19 schools, health care facilities and other public services. Dr. Millar will testify regarding the
20 Washington Fire Chiefs Association attempts to obtain accident risk information from the railroad
21 corporations. Dr. Millar will also testify about the regulatory program for railroads and the efficacy
22 of efforts to reform railroad safety laws. See Attachment "A".
23
24
25

Summary of anticipated testimony of Dr. Steve Running.

Dr. Steven W. Running is a University Regents Professor of Global Ecology at the University of Montana, Missoula, where he has taught and conducted research since 1979. His primary research interest is the development of global and regional ecosystem biogeochemical models integrating remote sensing with bioclimatology and terrestrial ecology. He is the Land Team Leader for the NASA Earth Observing System, Moderate Resolution Imaging Spectroradiometer, and is responsible for the EOS global terrestrial net primary production and evapotranspiration datasets. He has published more than 300 scientific articles and two books. He was a co-Lead Chapter Author for the 2014 U.S. National Climate Assessment. He currently Chairs the NASA Earth Science Subcommittee, and is a member of the NASA Science Advisory Council. Dr. Running was a chapter Lead Author for the 4th Assessment of the Intergovernmental Panel on Climate Change which shared the Nobel Peace Prize in 2007. Dr. Running is an elected Fellow of the American Geophysical Union, has been designated a Highly Cited Researcher by the Institute for Scientific Information, and in 2014 was designated one of "The World's Most Influential Scientific Minds" in Geosciences. He has been honored with the E.O. Wilson Biodiversity Technology Pioneer Award, and received the W.T. Pecora Award for lifetime achievement in Earth remote sensing from NASA and U.S. Geological Survey. In the popular press, his 2007 essay, "The 5 Stages of Climate Grief" has been widely quoted.

Dr. Running will testify about the current science of global climate change and how that change affects the Upper Columbia River Basin, now and in the future. Dr. Running will testify about the direct connections between combustion of fossil fuels such as coal and oil, increases in atmospheric concentrations of carbon dioxide, and consequent impacts on atmospheric air and

1 ocean temperatures. He will testify on subsequent impacts on ocean acidification and coral reef
2 bleaching. He will testify about the impacts of global warming on water resources (e.g., polar ice,
3 glaciers, snowpack, river flows), as well as acceleration of wildfires. He will testify on impacts to
4 socio-economic resources including agriculture, fishing, forestry, and outdoor recreation. He will
5 testify as to expected future warming from business-as-usual emissions, and how impacts are
6 expected to exacerbate in our region, and the anticipated impacts on people, the economy and
7 the environment.

8
9 Dr. Running will further testify regarding the imminent need to reverse course on climate
10 change and reduce emissions of atmospheric greenhouse gases to obtain a stable climate. He
11 will testify about the immediate need to significantly limit combustion of fossil fuels, and the risks
12 and threats to human society and planetary ecosystems that will occur if we fail to heed this need.
13 See Attachment "B".

14 Summary of anticipated testimony of Prof. Tom Hastings.

15 Prof. Tom Hastings is a member of the faculty in the Conflict Resolution degree program in
16 the School of Liberal Arts & Sciences at Portland State University, where he has taught and
17 conducted research since 2001. He has written extensively on nonviolent activism; his books
18 include A New Era of Nonviolence (2014) and Conflict Transformation (2011). He is a Consulting
19 Academic Adviser to the International Center on Nonviolent Conflict and directs PeaceVoice, a
20 program of the Oregon Peace Institute.

21 Prof. Hastings will testify that civil disobedience is a necessary component of strategies to
22 effect social change, particularly when addressing large and intractable issues such as the need
23 to reduce fossil fuel consumption. He will testify that when long-running campaigns fail to achieve
24 results, the use of extra-legal efforts becomes necessary. With respect to climate change and
25

1 fossil fuel extraction and consumption, changes in governmental and corporate policies have
2 been impossible to change through normal legal and political activities. As a result, defendants
3 have no reasonable legal alternatives to achieve their goals. Nonviolent civil disobedience has
4 been shown many times to change public opinion that leads to changes in public policy and law.
5 See Attachment "C".

6
7 **V. RELIEF REQUESTED**

8 Defendants, Individually and jointly, respectfully request that this Court allow them to plead
9 the affirmative defense of necessity, and to present evidence relevant to their defenses at trial -
10 specifically evidence regarding climate change and train/railroad safety in transporting coal and
11 volatile crude oil through our state. The defendants, Individually and jointly, further request that
12 this Court permit testimony from those expert witnesses for whom proffers of anticipated
13 testimony have been presented herein.

14 Dated this 24 day of April, 2017.

15
16 Respectfully submitted,

17 
18 Eric M. Christianson, WSBA # 19598
19 Attorney for Defendants
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Attachment "A"

FRED MILLAR
915 S. BUCHANAN ST. No. 29
ARLINGTON VA 22204
TEL: 703-979-9191 e-mail: fmillarfoe@gmail.com

Public interest and environmental safety advocate, national policy analyst and lobbyist, trade union strategic researcher, educator and consultant, based in Washington, D.C., with skills, technical expertise and national, local and international contacts in a wide range of issues and strategies. Recognized international analyst in nuclear waste storage and transportation and industrial chemical use, transportation and accident prevention, emergency planning and homeland security. Consultant to the major U.S. chemical and oil worker unions, environmental groups, insurance companies and university and governmental bodies including the District of Columbia Council. Campaigns and accomplishments have covered a wide range:

- Analyzed safety problems and advocated national and grassroots action strategies for chemical hazard assessment, emergency planning, accident prevention, and public access to information. Educated citizens, workers and public officials in scores of petrochemical communities on generic industrial safety issues and on existing risk documents such as worst-case accident scenarios. Advocated many specific safety improvement activities by companies and governments.
- Conceived, initiated and with allies advocated successfully for new legislation enacting a major new federal regulatory program on prevention of chemical accidents: The Clean Air Act Amendments of 1990 impact an estimated 15,000 U.S. chemical and oil facilities and provide an estimated \$3 billion of worker safety training and new risk documents for workers, government officials and the public.
- After 9/11 raised nationally and in major target cities the issue of urban transportation of ultrahazardous cargoes providing attractive targets/weapons for terrorists. Campaign included new re-routing bills introduced in 10 cities and 3 states, testimony in city council hearings, supporting materials solicited from experts, submission of expert affidavit for court case, community presentations, national overview articles in trade press and chapters in books, op-ed pieces and promotion of coverage by local and national media. Wrote and lobbied for national rail hazmat re-routing legislation signed by the President on August 3, 2007, and led subsequent efforts to improve the law and regulations.

2004-present Consultant on chemical accident and terrorism risks.

Projects for various clients included: proposed oil refinery expansion to use Hydrogen Fluoride in Bakersfield CA (comments on DEIS and community protest led to revised proposal without HF); analysis for Will County IL of proposed 10-fold expansion of rail freight including hazmat cargoes through 30 populated Chicago suburbs; analysis of terrorism risk scenarios in publications by Columbia University and insurance company; media research on regional rail

hazmat risks; analysis of transportation risks of nerve gas chemicals; comment on CA state task force on railroad safety; analysis of chlorine transportation routes; for City of Savannah, analysis of LNG trucking risks and recommendations for local hazmat flow study; analysis of risks of major petrochemical port in South America; analyses for Natural Resources Defense Council and Earthjustice on fire and explosion hazards of crude oil terminals and transportation; consulting for citizen and first responder groups, most recently on crude oil by rail issues in Albany NY, Virginia, Washington State and Washington DC.

2003-2005 Director, Target Cities Re-Routing Project, Friends of the Earth, Washington, D.C.

Initiated foundation-funded project to reduce safety and terrorism risks in transportation of ultrahazardous industrial chemical cargoes through High Threat Target Cities, with beginning focus in the Nation's Capital. Analyzed issues and regulations and advocated successfully for enactment of local DC Council Bill 15-525 banning the most dangerous cargoes; did technical, legal and regulatory analysis for fact sheets, Council testimony and slides; led alliance of union locals, tourist industry, emergency room physicians, environmentalists and public health associations in promoting the bill; did outreach and community presentations to Local Emergency Planning Committees, Metropolitan Washington Council of Governments, George Washington University occupational health forum, and media shows. Met with major stakeholders such as chemical shippers, city agencies, and railroads. Analyzed the issues and initiated introduction of re-routing ordinances in 10 other target cities, including St. Louis, Minneapolis, Memphis, Buffalo, Albany, Cleveland, Baltimore, Boston, Chicago and state legislatures of New York State and Tennessee. As the issue reached the national level in 2005 and again in 2007, helped write re-routing legislation for several committees of the House and Senate, and commented on the 2006 proposed twin rail security regulations from the Transportation Security Administration/DHS and US DOT. Consulted with target city governments, TV investigative reporters, national media, citizen groups. Invited expert presentation on dangerous cargoes to US Coast Guard's Chemical Transportation Advisory Committee, May 2006, Philadelphia PA and in roundtable "Railroad Routing of Hazardous Materials Expert Panel" hosted by ATSDR/DHS/SRB, September 2006 Atlanta GA. Wrote op eds and articles for trade journals and for book: James J.F. Forest (ed.), "Homeland Security" by Praeger Security International, 2006, Volume 3.

2004-2005 Consultant, International Brotherhood of Teamsters Rail Conference, Washington, D.C.

Analyzed rail safety, transportation security, and Liquified Natural Gas facility security issues for the Research and Strategic Initiatives departments. Initiated project for survey and publication "High Alert" on chemical security issues in rail yards.

2001-2002 Consultant, Bio-Terrorism Technology, Public Technology Inc., Washington, D.C.

Analyzed availability of emerging technologies from federal laboratories for detection and decontamination of biological agents for use by local officials in a terrorism context. Analyzed

technical and testing data, provided summaries, wrote comparisons of the technologies and recommendations for an ongoing system of third-party assessment and user needs surveys that could help local officials wisely spend public funds on new capabilities.

2000-2001 Research Director, Roofers International Union, Washington, D.C.
In the service of an organizing campaign with residential construction workers in the Southwest U.S., did strategic corporate analysis on major homebuilder corporations. Wrote homebuilder corporate profiles and White Paper on worker justice issues. Advocated strategies on sprawl, retirees and healthcare, and networked with union retiree groups, Interfaith Councils, AFL-CIO and other allies. Did web analysis and advocacy for the campaign website, campaign leaflets, etc.

1999-2000 Director of Environmental and Public Safety Policy, Center for Y2K and Society, Washington, D.C.
Analyzed and publicized the potentially catastrophic systemic safety risks that Y2K posed to major national infrastructures such as petrochemical, water supply and food industries, to at-risk communities and to democratic decision-making. Wrote technical and policy analyses and policy and action-oriented recommendations content for Center's website. Advocated safety improvements in national and local forums and in weekly conference calls with allies.

1995-1997 D.C. Coordinator, Nuclear Waste Citizens Coalition, Washington, D.C.
Coordinated the work of a coalition of national and regional groups, from both commercial nuclear power plant communities and nuclear weapons site communities. Analyzed issues of centralized interim storage and transportation of irradiated fuel. Did technical research and organized and led Congressional advocacy, convened meetings of member groups, and wrote weekly fact sheets, analyses and recommendation on the issue.

1994-2002 Consultant, nuclear waste and chemical accident prevention policies
Clients included Public Technology Inc., Oil Chemical and Atomic Workers International Union, United Steelworkers of America, International Chemical Workers Union, Operating Engineers International Union, Friends of the Earth/England and Wales, National Environmental Law Center, Environmental Working Group, Labor Ministry of Brazil, Greenpeace International. Provided analysis for curriculum and delivered content at chemical accident prevention training programs, advocated for safety improvements at conferences on chemical accident prevention policy and programs, advocated for worker and citizen action implementing the new US chemical accident prevention laws.

1989-1994 Director of the Toxics Project, Friends of the Earth, Washington, D.C.
Responsible for analysis, policy development, lobbying and advocacy in chemical accident prevention, risk assessment, air toxics emissions, right-to-know issues, hazardous materials

transportation and multinational corporate accountability.

- Built ad hoc partnerships of activists, workers, state and local officials and media contacts in chemical communities and provided technical and strategy analysis and recommendations. Founded and initially steered the Working Group on Community Right-To-Know, comprised of national and local environmental groups and labor unions. Wrote and published foundation-funded "The Community Plume" publication with analyses and fact sheets, to recommend strong roles for federally-mandated Local Emergency Planning Committees.
- As a safety analyst and policy expert, addressed international conferences on chemical accident prevention. Served as environmental advocate with the U.S. government delegations and developed recommendations for safety improvement in conferences with industry and government participants in London, Manchester, Stockholm, Berlin, Boston, Milan, Goa and Ahmedabad (India), and Tokyo.
- Worked with the environmental and labor coalition that in 1991-94 lobbied OSHA and EPA, advocating regulations to implement the Clean Air Act Amendments of 1990. Provided analysis and recommendations for testimony in Congressional hearings and wrote technical comments on proposed regulations.
- As an OSHA grant-funded consultant to the three major U.S. petrochemical labor unions, trained groups of workers in several cities on chemical accident risks and accident prevention. Advocated in Congress for two major unions for new worker safety training funds.
- *International advocacy:* gave invited presentations on chemical accident prevention and community right-to-know policy and legislation to government and industry officials, universities and citizens groups in Brazil, Canada, Lithuania, Latvia, Bulgaria, Mexico, India, Vietnam, Thailand, Germany, Argentina, and Australia.

1979-1988 Director of the Nuclear and Hazardous Materials Transportation Project at the Environmental Policy Institute, Washington, D.C.

Spearheaded environmentalist efforts, educated the public and advocated for safety improvement by the government and corporations on issues of nuclear and hazardous materials storage and transportation.

Worked with Capitol Hill, several regulatory agencies, national trade associations, national media, environmental NGOs, labor unions, petrochemical industry, investor groups, and funders to develop recommendations in testimony before several House and Senate committees.

1978-1979 Research consultant, Ohio Public Interest Campaign.

Working under a federal grant, researched and wrote final evaluation of a four-year project on plant closings in Ohio.

1972-1978 Assistant Professor of Sociology, George Mason University, Fairfax, Virginia.
Taught political sociology, social problems, sociology of war and peace, social theory.

PUBLICATIONS

- Op ed, Minneapolis Star Tribune, "Oil trains are disasters-in-waiting," 11 17 14
- Op ed, Pittsburgh Post Gazette, "Danger on the Rails that Run through Pittsburgh", 2 13 14
- Fire Chief Fire Magazine blog 9 21 10 "Coming to a City Near You" on rail security
- Cargo Security International report 2pp, "Rail Security: Risk Factors", June-July, 2010
- "Terror threats ought to factor into rail routes," op ed June 19, 2009, Minneapolis, Minn., Star Tribune.
- "Dangerous railroad cargo could threaten public safety", op ed July 17 2009, St Louis Post-Dispatch
- White Paper, Friends of the Earth, "Transcontinental Freight Rail Monopoly Game: Chicago Area Communities In Play and At Risk" September 2008
- "Seven Years After 9/11: No Protective Rail Hazmat Re-Routing Yet", guest column in Government Security News, March 18, 2009
- "Don't Insult Citizens", letter to editor, May 11, 2008, Bakersfield Californian
- "Diverting Risk", Cargo Security International, December 2008/January 2009, pp. 26-28
- "Rails shouldn't fight hazmat rules", analysis of new federal regulations, in The Journal of Commerce, January 21, 2008
- "Betting the Nation: Poison Gas Cargoes Through Target Cities," in James J.F. Forest (ed.), "Homeland Security: Protecting America's Targets" by Praeger Security International 2006, Volume 3 "Critical Infrastructure".
- "The Elephant in the Living Room," opinion piece on WMD cargoes in ports, in The Journal of Commerce, May 1, 2006.
- "New Strategies to Protect America: Putting Rail Security on the Right Track", a paper in the Critical Infrastructure Security Series, published by the Center for American Progress, 2005.

- "City Limits", Opinion piece on hazmat security, in Cargo Security International magazine, October 2004.
- "The Terrorism Prevention and Safety in Hazardous Materials Transportation Act of 2004", DC Bill 15-525, enacted in February 2005. Upheld in Federal District Court, it has been the model for similar re-routing bills in Baltimore, Cleveland, Boston and Chicago
- * "Hell Might Come on Wheels," op-ed piece in "Close To Home" section, Washington Post, February 16, 2003, on the terrorism and hazardous materials transportation issue.
- * Articles with recommendations for school boards on terrorism and hazardous materials issues, "School Board Journal", 2003.
- * "Don't Harm the Most Vulnerable", a White Paper on Residential Construction in the Southwest, Roofers Local 135, Phoenix AZ, July 2000
- * "Y2K and the Environment: The Challenge for Local Officials", published by Public Technology Incorporated, 1999.
- * "Winning the Right-To-Know", in The Environmental Forum, December, 1992
- * "The Community Plume", a foundation-funded publication that Friends of the Earth sent to 4100 Local Emergency Planning Committees in the U.S., 1988-91.
- * Op-Ed piece, New York Times Business Section, "Braking the Slide in Chemical Safety", May 1986
- * "Regulations on the Routing of Irradiated Fuel," a chapter in The Urban Transport of Irradiated Fuel (Macmillan Press, 1984)
- * "Hazardous Materials Transportation", a series of three articles for International Fire Chief magazine, 1981.

EDUCATION

B.A. in Philosophy from Notre Dame University (1966)

M.A. and Ph.D. in Sociology from Case Western Reserve University (1975).

Attachment "B"

Steven W. Running

Regents Professor/Director, Numerical Terradynamic Simulation Group (NTSG)
College of Forestry & Conservation, University of Montana, Missoula, MT 59812
Phone: (406) 243-8311

Email: swr@ntsg.umt.edu

Home Page: <http://www.ntsg.umt.edu>

Born: April 18, 1950; U.S. Citizen; Marital Status: Married, 2 children
Home: 1419 Khansbad Drive, Missoula, MT 59802, Tel: (406) 721-6096

Education:

Ph.D. Forest Ecophysiology; Colorado State University, Fort Collins, 1979
M.S. Forest Management; Oregon State University, Corvallis, 1973
B.S. Botany; Oregon State University, Corvallis, 1972

Society Affiliations:

American Geophysical Union
American Meteorological Society
Ecological Society of America
American Association for the Advancement of Science

Awards, Honors:

NASA-USGS 2015 William T. Pecora Award
ISI World's Most Influential Minds, Geosciences 2014
Montana Environmental Information Center Conservationist of the Year 2012
Doctor Honoris Causa University of Natural Resources and Life Sciences, Vienna Austria 2012
Honorary Professor, Environment Institute and Dept. of Geography, University College London 2009
Oregon State University Distinguished Alumni Fellow 2009
E. O. Wilson Biodiversity Technology Pioneer Award 2009
Chapter lead author of IPCC 2007 report, awarded the Nobel Peace Prize 2007
Univ. Of Montana Presidential Scholar 2008
University of Montana, Lud Browman Award for scientific writing, 2007
Oregon State Univ. College of Forestry, Distinguished Alumni, 2006
Burk-Brandenburg Montana Conservation Award, 2006
ISI Highly Cited Scientist Designation 2004-
Fellow of the American Geophysical Union, 2002
University of Montana BN Faculty Achievement Award, 1991
University of Montana, Distinguished Scholar, 1990

Invited International Speaking

Thailand, Taiwan, Sweden, Austria, India, United Kingdom, Portugal, Italy, S. Korea, Australia

Nat'l/int'l Committee Appointments:

NASA Science Committee 2013 - 2015
NASA Earth Science Subcommittee 2009 - 2015, Chair 2013- 2015
NOAA Climate Working Group, 2009 - 2014
National Academy of Sciences, NRC Committee on Ecological Impacts of Climate Change, 2008.
NCAR CCSM Land Model Working Group (LMWG) Co-Chair, 2006-2008.
AGU Committee of Fellows 2006-2008.
Dept of Energy, Terrestrial Carbon Science Research Program, Co-Chair, 2005-2008.
National Research Council, NASA Earth Science Decadal Survey, 2005-2008.
NRC Committee on Environmental Satellite Data Utilization 2002-2005.
Intergovernmental Panel on Climate Change, Chapter Lead Author 2004-2007.
International Geosphere-Biosphere Programme Science Executive Committee 2004-2007.
National Research Council: Committee on Earth Studies 2004-2008.
NCAR CCSM Land Model Working Group (LMWG) Co-Chair, 2002-2004.
Interagency Carbon Cycle Science Committee 2002 - 2006.
NAS-NRC Review of NASA Earth Science Enterprise Science Plan for 2000-2010.
NASA - Earth Observing System MODIS Science Team Member, 1999-2007.
NCAR Climate System Model (CSM) Advisory Board, 1996-2000.
NASA Mission to Planet Earth Biennial Review Panel, 1997.
Terrestrial Observation Panel for Climate of the World Meteorological Organization, 1995-2001.
National Academy of Sciences, NRC, Climate Research Committee, 1995-2001.
NRC Panel on Climate Observing System Status, 1998.
NSF - National Center for Ecological Analysis and Synthesis, Science Advisor Board, 1994-1997.

NASA Earth Observing System, Land Science Panel, Chair 1994-2000.
 World Climate Research Program, International Land Surface Climatology Science Panel, 1994-1996.
 World Climate Research Program, Global Terrestrial Observing System Committee, 1994-1995.
 International Geosphere-Biosphere Program, Biospheric Aspects of the Hydrologic Cycle, Vice-Chair, 1991-1996.
 National Science Foundation, Ecosystem Studies Program panel member 1991-1993.
 World Climate Research Program - WCRP/IGBP Land Surface Experiments, 1990-1994.
 NASA Earth Science and Applications Advisory Subcommittee, 1990-1993.
 NASA Boreal Forest Ecosystem-Atmosphere Study (BOREAS) Steering Committee, 1989-1991.
 International Geosphere-Biosphere Program - Committee on Global Hydrology, 1988-1990.
 NASA - Terrestrial Ecosystems Program Advisory Group, 1988-1990.
 NASA - Management Operations Working Group, 1988-1990.
 NASA - Interdisciplinary Studies Review Panel, 1986.
 NASA - MODIS Instrument Panel, 1984-1986.
 NASA - Global Biology Review Panel, 1983-1984.
 National Academy of Sciences, Space Science Board participant, 1982-1984.
 NASA - Land Related Global Habitability Program Planning, 1982-1983.

Proposal Reviewer:

American Institute of Biological Sciences
 California Space Institute
 Canada Foundation for Innovation
 National Aeronautics and Space Administration
 National Oceanic and Atmospheric Administration
 National Environmental Research Council of the United Kingdom
 National Science Foundation
 Natural Sciences and Engineering Research Council of Canada
 U.S. Dept. of Energy
 U.S. Environmental Protection Agency
 U.S. Geological Survey
 U.S.D.A. Cooperative Research Program
 Western Regional Center of the National Institute for Global Environmental change

Journal Referee:

Agricultural and Forest Meteorology
 Agronomy Journal
 AI Applications in Natural Resource Management
 American Naturalist
 Australian Journal of Forest Research
 Bioscience
 Canadian Journal of Botany
 Canadian Journal of Forest Research
 Canadian Journal of Remote Sensing
 Climatic Change
 Climate Research
 Ecological Applications
 Ecology
 Forest Science
 Global Change Biology
 Intl Journal of Hydrological Processes
 Intl Journal of Remote Sensing
 Journal of Applied Meteorology
 Journal of Climate
 Journal of Environmental Quality
 Journal of Geophysical Research
 Journal of Hydrology
 Journal of Range Management
 National Geographic Research and Exploration
 Nature
 Northwest Science
 Remote Sensing of Environment
 Science
 Tellus
 The National Academies
 Tree Physiology
 USFS Intermountain Forest and Range Experiment Station
 USFS Pacific Northwest Forest and Range Experiment Station
 USFS Rocky Mountain Forest and Range Experiment Station
 Water, Air and Soil Pollution
 Water Resources Research

Experience:

2007-	Regents Professor, University of Montana
2008	Visiting Professor, Universität de Bodenkultur, Vienna, Austria
1988-present	Professor, Forest Ecology, College of Forestry & Conservation, University of Montana
2005	Visiting Professor, University of Firenze, Florence, Italy
2003	Professor, Visiting McMaster Fellow, CSIRO Land and Water, Canberra, ACT Australia
1993	Visiting Sabbatical Scientist, Dept of Plant Ecology, Lund University, Sweden
1988-87	Visiting Sabbatical Scientist, CSIRO Division of Forest Research, Canberra, Australia
1983-1988	Associate Professor, Forest Ecophysiology, School of Forestry, University of Montana
1979-1983	Assistant Professor, Forest Ecophysiology, School of Forestry, University of Montana
1979	Senior Research Associate, Natural Resource Ecology Laboratory, Colorado State University
1976-1979	Research Forester, Forest and Mtn Meteorology Project, Rocky Mtn Forest and Range Experiment Station, Fort Collins, Colorado
1976-1979	Graduate Research Assistant, Dept. of Forest and Wood Sciences, Colorado State University
1974-1976	Research Assistant, Coniferous Forest Biome, Oregon State University
1973-1974	Forest Ecologist, Environmental Associates Inc., Corvallis, Oregon

Publications in last 5 years:

Hidy, Dóra, Zoltán Barcza, Hrvoje Marjanovi, Maša Zorana Ostrogovi Sever, Laura Dobor, Györgyi Gelybó, Nándor Fodor, Krisztina Pintér, Galina Churkina, Steven Running, Peter Thornton, Gianni Bellocchi, László Haszpra, Ferenc Horváth, Andrew Suyker, and Zoltán Nagy. Terrestrial ecosystem process model .Biome-BGCMuSo v4.0: summary of improvements and new modeling possibilities. *Geosci. Model Dev.*, 9, 4405–4437, 2016.

Sanchez-Ruiz, Sergio, Alvaro Moreno, Maria Piles, Fabio Maselli, Arnaud Carrara, Steven Running & Maria Amparo Gilabert (2016): Quantifying water stress effect on daily light use efficiency in Mediterranean ecosystems using satellite data, *International Journal of Digital Earth*, DOI: 10.1080/17538947.2016.1247301.

Ahrestani, F.S., Hebblewhite, M., Smith, B., Running, S.W., Post, E., 2016: Dynamic complexity and stability of herbivore populations at the species distribution scale. *Ecology*, 97(11): 3184–3194.

Ballantyne, Ashley, William Smith, William Anderegg, Pekka Kauppi, Jorge Sarmiento, Pieter Tans, Elena Shevliakova, Yude Pan, Benjamin Poulter, Alessandro Anav, Pierre Friedlingstein, Richard Houghton and Steven Running. Accelerating net terrestrial carbon uptake during the warming hiatus due to reduced respiration. *NATURE Climate* DOI: 0.1038/2034

Yu, Zhen, Jingxin Wang, Shirong Liu, Shilong Piao, Philippe Ciais, Steven W. Running, Benjamin Poulter, James S. Rentsch and Pengsen Sun. Decrease in winter respiration explains 25% of the annual northern forest carbon sink enhancement over the last 30 years. *Global Ecology and Biogeography*, (Global Ecol. Biogeogr.) (2016) DOI: 10.1111/geb.12441.

He, Mingzhu, John S. Kimball, Steven Running, Ashley Ballantyne, Kaiyu Guan, Fred Huemmrich. Satellite detection of soil moisture related water stress impacts on ecosystem productivity using the MODIS-based photochemical reflectance index. *Remote Sensing of Environment* 186 (2016) 173–183.

Wang, J., J. Dong, Y. Yi, G. Lu, J. Oiler, W. K. Smith, M. Zhao, J. Liu, and S. Running (2017), Decreasing net primary production due to drought and slight decreases in solar radiation in China from 2000 to 2012, *J. Geophys. Res. Biogeosci.*, 122, 261–278, doi:10.1002/2016JG003417.

Zhang, KE, John S. Kimball and Steven W. Running. A review of remote sensing based actual evapotranspiration estimation. *WIREs Water* 2016. doi: 10.1002/wat2.1168.

Oiler, J.W., S.Z. Dobrowski, Z.A. Holden, and S.W. Running (2016), Remotely sensed land skin temperature as a spatial predictor of air temperature across the conterminous United States. *J. Appl. Meteorol. Climatol.*, <http://dx.doi.org/10.1175/JAMC-D-15-0276.1>.

Alfred, B. W., Smith W. K., Twidwell D., Haggerty J. H., Running S. W., Naugle D. E., and Fuhlendorf S. D. Ecosystem services lost to oil and gas in North America. (2015) *Science*, Volume 348, Issue 6233.

- McDowell, N., Coops N. C., Beck P., Chambers J. Q., Gangodagamage C., Hicke J. A., Huang C., Kennedy R. E., Krofcheck D. J., Litvak M., Meddens A. J. H., Muss J., Litvak M., Negrón-Juárez R., Peng C., Schwantes A. M., Swenson J. J., Vernon L. J., Williams A. P., Xu C., Zhao M., Running S. W., and Allen C. D. (2015). Global satellite monitoring of climate-induced vegetation disturbances. *Trends in Plant Science* 20(2) 114-123.
- Mora, C., Caldwell I. R., Caldwell J. M., Fisher M. R., Genco B. M., and Running S. W. 2015. Suitable Days for Plant Growth Disappear under Projected Climate Change: Potential Human and Biotic Vulnerability. *PLoS Biol*, 06/2015, Volume 13, Issue 6, (2015)
- Running, S. W. 2014. A regional look at HANPP: human consumption is increasing, NPP is not. *Environmental Research Letters*, 11/2014, Volume 9, Issue 11.
- Reeves, M. C., Moreno A. L., Bagne K. E., and Running S. W. Estimating climate change effects on net primary production of rangelands in the United States , *Climatic Change* , 09/2014, Volume 128, Issue 3-4, (2014)
- Oyler, J. W., Dobrowski S. Z., Ballantyne A. P., Kiene A. E., and Running S. W. 2015. Artificial amplification of warming trends across the mountains of the western United States,, *Geophysical Research Letters*, 01/2015, Volume 42, Issue 1,
- Poulter, B., Frank D., Ciais P., Myrneni R. B., Andels N., Bi J., Broquet G., Canadell J. G., Chevallier F., Liu Y. Y., et al. Contribution of semi-arid ecosystems to interannual variability of the global carbon cycle,, *Nature*, 04/2014, Volume 509, Number 7502, p.600-603.
- Madani, N., Kimball J. S., Affleck D. L. R., Katge J., Graham J. S., van Bodegom P. M., Reich P. B., and Running S. W. Improving ecosystem productivity modeling through spatially explicit estimation of optimal light use efficiency , *Journal of Geophysical Research: Biogeosciences*, 08/2014, Volume 119, p.1-16, (2014)
- Hansen, A.J. N. Piekielek, C.Davis, J. Haas, D.M.Theobald, J.E.Gross, W.B Monahan, T.Oliff, and S.W.Running (2014). Exposure of U.S. National Parks to land use and climate change 1900 – 2100. *Ecological Applications* 24(3) 484-502.
- Pan, S., Tian H., Dangal S. R. S., Ouyang Z., Tao B., Ren W., Lu C., and Running S. W. Modeling and Monitoring Terrestrial Primary Production in a Changing Global Environment: Toward a Multiscale Synthesis of Observation and Simulation, *Advances in Meteorology*, 04/2014, Volume 2014, Number 965936, p.1-17, (2014)
- Smith, W. K., C. C. Cleveland, S. C. Reed, and S. W. Running (2014), Agricultural conversion without external water and nutrient inputs reduces terrestrial vegetation productivity, *Geophys. Res. Lett.*, 41, doi:10.1002/2013GL058867
- Kang, Sinkyu; Running, Steven W.; Kimball, John S. Daniel B. Fagre, Andrew Michaelis, David L. Peterson, Jessica E. Halofsky, Sukyoung Hong (2014). Effects of spatial and temporal climatic variability on terrestrial carbon and water fluxes in the Pacific Northwest, USA. *ENVIRONMENTAL MODELLING & SOFTWARE* Volume: 51 Pages: 228-239.
- Oyler, J.W., A.P.Ballantyne, K. Jencso, M.Sweet, and S.W.Running 2014. Creating a daily air temperature dataset for the conterminous United States using homogenized station data and remotely sensed skin temperature. (2014) *Int. J. Climatology*. DOI 10.1002/joc.4127.
- Bastos, A., Running S. W., Gouveia C., and Trigo R. M. (2013). The global NPP dependence on ENSO: La Niña and the extraordinary year of 2011 *Journal of Geophysical Research: Biogeosciences* , Volume 118, Issue 3, Number 3, p.1247-1255,
- Ruhoff, A. L.; Paz, A. R.; Aragao, L. E. O. C.; Mu, Q., Running, S.W. 2013. Assessment of the MODIS global evapotranspiration algorithm using eddy covariance measurements and hydrological modelling in the Rio Grande basin *HYDROLOGICAL SCIENCES JOURNAL-JOURNAL DES SCIENCES HYDROLOGIQUES* Volume: 58 Issue: 8 Pages: 1658-1676

Attachment "C"

CURRICULUM VITAE

Tom H. Hastings, Assistant Professor

January 2017

<http://www.pdx.edu/conflict-resolution/tom-hastings>

Education

- Ed.D. 2012 Educational Leadership: Curriculum & Instruction,
Graduate School of Education, Portland State University
M.A. 1996 Mass Communication, University of Wisconsin-Superior
B.A. 1993 Peace Studies, Northland College, *summa cum laude*

Employment (related)

- Faculty, Conflict Resolution, Portland State University, 2001-present
Moderator, ICNC/Rutgers Civil Resistance course, Fall 2016
Lead academic programs successful proposal author, Portland State
University, Conflict Resolution BA/BS, Conflict Resolution minor.
Adjunct faculty, Portland Community College, 2001-2016
Adjunct faculty, Bluegrass Community and Technical College, 2012-2015
Director, PeaceVoice, 2005-present
Consulting Academic Adviser, International Center on Nonviolent Conflict,
2012-present (including guest presentations at Rosario University in Bogota in
2012, founding faculty for James Lawson Institute in 2013 and 2014 and
continues, after one year on Academic Council, 2016)
Research professor/coder, Erica Chenoweth NAVCO 2.0, Sept-Oct 2014
Research proposal reviewer, National Research Foundation of Korea, 2010-
2011
Associate Editor, *The PeaceWorker*, Oregon PeaceWorks, 2003-2007.
Adjunct faculty, Communications, Marylhurst University, 2002
Adjunct faculty, Peace and Conflict Studies, Pacific University, 2001
Coordinator, Peace and Conflict Studies program, Northland College, 1998-
2000.
Instructor, Political Science, University of Wisconsin-Extension, 1993-1996
Education Director, Circle Pines Camp, 1990

Dissertation

Giving Voice to the Peace and Justice Challenger Intellectuals: Counterpublic
Development as Civic Engagement, 2012, Swapna Mukhopadhyay, Chair

Refereed Publications or Other Creative Achievements

1. Books, Co-edited
(2013). *Conflict transformation: Essays on methods of nonviolence*. Jefferson, NC:
McFarland.
2. Chapters
Getting peace professionals to go public, Peace and public life, Gail Presbey
and Greg Moses (Eds.) (2013). New York, NY: Rodopi.

Counternarratives to the intelligentsia: Understanding impediments to aspirant public peace intellectuals, in *Nonkilling* (in press). University of Hawaii.

Apathy, aggression, assertion, and action: Managing image for nonviolent success, in Ndura, E. & Amster, R. (Eds.) (2013). *The power of nonviolence: Peace, politics, and practice for the 21st century and beyond*. Syracuse, NY: Syracuse University Press.

Peace professionals in U.S. media, in Ndura, E. (Ed.) (2009). *Building cultures of peace*. Cambridge University Press.

Plowshares network, in Young, N. (Ed.). *Oxford International Encyclopedia of Peace*. Oxford University Press.

3. Articles

2017, Three challenges to civil resistance. *Peace Review: A Journal of Social Justice*, in press. <http://dx.doi.org/10.1080/10402659.2017.1272336>

2013, Climate chaos and conflict management. *Peace Review: A Journal of Social Justice*, 25(4).

2005, Media messaging and conflict. *Peace Review: A Journal of Social Justice*, 17 389-395

2004, First-strike forgiveness: Nonviolence v killing the spirit in the name of religion. *Acorn*

2003, Blood rites, Mimesis, War and the Law. *Peace and Conflict Studies Journal*

4. Book reviews

2016, Janjira Sombatpoonsiri. *Humor & Nonviolent Struggle in Serbia*. *Peace & Change*. 41, 4, 567-569, Oct. 2016. ISSN: 01490508.

(2013) Rosalie G. Riegler. *Doing time for peace: resistance, family, and community*. *Peace & Change*.

2010, The bases of empire: The global struggle against U.S. military posts. *Island of shame: The secret history of the U.S. military base on Diego Garcia*. *Peace Review*, 22 (2) 118-121.

Blossoms on the olive tree: Israeli and Palestinian women working for peace. *International Journal on World Peace*, XXVII (2) June 2010 90-93.

Global Civil Society 2006/7, *Journal of World Peace* XXIV(4)137-140.

2007, Global Directory of Peace Studies and Conflict Resolution Programs, *Peace and Conflict Studies Journal* 2007

October 2000, Review, A Few Small Candles, *Peace Review*.

1993 "Reel apartheid," *Viewpoints* (academic journal of Wisconsin Institute)

5. Academic peer-reviewed webinars

- 10 March 2011, Image management in nonviolent civil society struggles, International Center on Nonviolent Conflict. <https://www.nonviolent-conflict.org/image-management-in-nonviolent-civil-society-struggles/>
- 15 January 2016, Dr King's Letter from Birmingham jail, International Center on Nonviolent Conflict. <https://www.nonviolent-conflict.org/dr-kings-letter-birmingham-jail-lessons-civil-resistance-movements/>

Reviewer (blind)

- *Acorn: Journal of the Gandhi-King Society*
- *Journal of Peace Education*
- International Peace Research Association Foundation

Non-Refereed Publications or Other Creative Achievements

Includes both unpaid and paid publications

Books

Authored

(2014). *A new era of nonviolence*. McFarland.

(2006). *Lessons of nonviolence*. McFarland.

(2005). *Power: Nonviolence from the transpersonal to the transnational*. Hamilton.

(2004). *Nonviolent Response to Terrorism*. McFarland.

(2002). *Meek ain't weak: Nonviolent power and people of color*. University Press of America.

with Geov Parrish (2002). *52 true stories of nonviolent success*. War Resisters League.

(2000). *Ecology of war and peace: Counting costs of conflict*. University Press of America.

Chapters

Human flood in Smith, Gar (Ed.) (2017). *War and the environment*. Berkeley, CA: Foundation for Deep Ecology (in press).

Nonviolent response to terrorism: Acting locally (pp. 213-220), in Ram, S. & Summy, R. (2008). *Nonviolence: An alternative for defeating global terror (ism)*. New York, NY: Nova Science Publishers.

(2008). Myth: Militarism has no real environmental costs. In: Buchheit, P. (Ed.) *American wars: Illusions and realities*. Atlanta, GA: Clarity Press.

(2007). Movement-building, or the Portland story, in Annis, M. & Palacek, M. (2007). *The cost of freedom: The anthology of peace & activism*. Berthoud, CO: Howling Dog Press.

Articles

2011-2016, 93 published op-eds distributed by PeaceVoice:

<http://www.peacevoice.info/category/tom-h-hastings/>

(11 November 2011). Dealing with agents provocateurs. Nonviolent Action Network: <http://nonviolentaction.net/?author=870>

(17 November 2010). The Anishinabe and an unsung nonviolent victory in late twentieth-century Wisconsin, Open Democracy:

<http://www.opendemocracy.net/author/tom-hhastings>

ongoing: articles on Huffington Post

ongoing: articles on Truthout

ongoing: articles and commentary in *PeaceWorker*

ongoing: articles, Oregon Peace Institute newsletter

ongoing: articles, reviews in *Peace Chronicle*, newsletter of the Peace and Justice Studies Association

1997-2000, commentary and review, weekly Northland Reader
1998-2000, occasional articles, commentary, Pulse; Wausau Daily Herald;
Above the Bridge

1992-2000, occasional articles, commentary, review, City Pages

1998 co-author, editor, *Maternal Convictions*

1997 editor, Long Sentences: Nonviolent Incites, newsletter of Laurentian
Shield

1996 co-author, *Laurentian Shield: Nonviolent Disarmament of the Nuclear
Navy in Wisconsin*

1995 author *If I Had a Pen: Promoting Nonviolence Toward the Turn of the
Millennium* (Masters degree final writing project)

July-August 1994, Review, *Close to Home: Women Reconnect Ecology, Health
and Development Worldwide* by Vandana Shiva, editor

1994 author *Nonviolence and the New Millennium: Thoughts on Saving the
Peace* (unpublished except some individual portions separately)

1992-1996 contributing editor (monthly column), Silent Sports of Waupaca,
Wisconsin

1992-1996 feature writer (monthly article), BusinessNorth of Duluth-
Superior

1992-1994 editor, The Inland Sea quarterly newsletter for Lake Superior
preservationists

1992 feature writer, Masinaigan of the Great Lakes Indian Fish and Wildlife
Commission

1990-present, freelance writer with articles/commentary in: Ocean Realm of
Galveston, Texas; Isthmus of Madison, Wisconsin; AIM of Chicago, Illinois;
Above the Bridge of Houghton, Michigan, Pulse of Minneapolis, Northland
Reader of Duluth and others

1983-1988, editor, Citizens for Alternatives to Trident & ELF newsletter

Presentations at Professional Meetings

October 2015, A Dialogue on Gun Violence in the U.S, PJSA, James
Madison U.

October 2014, A new era of nonviolence. PJSA, Kroc Institute, U of San
Diego.

(November 2012) *Identifying barriers to public peace intellectualism.*
International Peace Research Association, Mie University, Japan.

Hawaii International Education, Honolulu, HI, Jan 2012, "Teaching about
Arab Spring," workshop.

Peace and Justice Studies Association, Christian Brothers University,
October 2011, "New Voices from the margins of conflict resolution."

Hawaii International Education, Honolulu, HI, Jan 2011, "Teaching strategic
nonviolence," paper presentation.

Peace and Justice Studies Association, University of Manitoba and Menno
Simmons College, October 2010, "PeaceVoice: A public peace intellectual
project."

International Peace Research Association, University of Sydney, Australia,
July 2010, "Peace journalism: New normative directions."

Teaching Nonviolent Civil Resistance, International Center on Nonviolent Conflict symposium, May 2010 "Peace and nonviolent civil society resistance pedagogical historiography."

Hawaii International Education, Honolulu, HI, Jan 2010, "Problems for public peace scholars," paper presentation.

Peace and Justice Studies Association, Marquette University, October 2009, "Creating public peace scholars."

Hawaii International Education, Honolulu, HI, Jan 2009, "Teaching Peace Journalism," paper presentation

Peace and Justice Studies Association, Portland State University, September 2008, "Peace professionals and public intellectualism," paper presentation

International Peace Research Association biennial conference, Leuven, Belgium, July 2008, "War, peace and public intellectuals," paper presentation

Hawaii International Education, Honolulu, HI, Jan 2008, "Peace Educators and Civic Engagement," paper presentation

Concerned Philosophers for Peace, Manchester College, Nov 2007, "Peace Professors as Public Intellectuals: Our Civic Mission," keynote address

Peace and Justice Studies Association, Manhattan College, Oct 2007, "Public Peace Scholars"

Concerned Philosophers for Peace, St. Bonaventure University, Oct 2006, "NeoConned into a War on Terror: Peace Journalism responds."

Peace and Justice Studies Association, Manhattan College, Oct 2006, "PeaceVoice: Empowering the Peace Academy."

Swarthmore College, Keynote Speaker, 11 September 2006, "Nonviolent response to terrorism."

International Peace Research Association, University of Calgary, July 2006, "Local to global: nonviolent response to terrorism."

International Center on Nonviolent Conflict, Colorado College, June 2006, "Nonviolence as negotiation."

PsySR-CSJ Conference, Lewis and Clark College, 3 May 2005, War, Peace and Media.

Peace and Justice Studies Association, University of San Francisco, 5 Oct 2004, "Peace messaging."

Gettysburg College, Gettysburg PA, Keynote address, 17 November 2003, Ecology of war & peace.

Concerned Philosophers for Peace, Pacific University, 23 Oct 2003, "First-strike forgiveness and the theories of Conflict Resolution."

Peace and Justice Studies Association, The Evergreen State Teachers College, 7 Oct 2003, "Nonviolent response to terrorism."

Portland State University, 23 May 2003, Academic panel presentation, "Iraq: What next?"

Western Washington University, Keynote address, 15 April 2003, "Building a peace movement."

Academic panel presentation, Portland State University, 12 April 2003, "From war to what for Iraq?"

Academic panel presentation, Portland State University, 19 November 2002, "War on Iraq?"

Peace and Justice Studies Association, Georgetown University, 5 Oct 2002, "WWGD? How Gandhians are teaching post 9.11."

Peace and Justice Studies Association, The Evergreen State Teachers College, 6 Oct 2001, "Meek Ain't Weak: Nonviolent Power and People of Color."

Peace Studies Association, University of Texas-Austin, 1 April 2000, "Co-creating a Peace Studies program with students."

Sigurd Olson Community series, November 1999, "Building Communities of Peace."

Peace Studies Association, Sienna College, Oct 1999, "Teaching Ecology of Peace."

Oxfam lecture, October 1999, "Hunger for Peace: military theft from the world's children."

PSA/COPRED conference, Siena College, April 1999, "Teaching Ecology of War and Peace."

Sigurd Olson Institute, Restoration series, November 1998, "In Defense of Restoration: Converting Military Holdings to Public Use."

Wisconsin Institute for the Study of Peace and Conflict, October 1998, "From the Moral Low Ground: The U.S. Dictates to the Developing World."

Wisconsin Institute for the Study of Peace and Conflict, April 1993, "Environmental injustice."

Wisconsin Institute for the Study of Peace and Conflict, April 1992, "Nonviolent liberation."

Wisconsin Institute for the Study of Peace and Conflict, April 1991, "Nonviolence and national defense."

Wisconsin Environmental Education Conference, Telemark Lodge, January 1991, "Ecology of War & Peace."

Honors, Grants, and Fellowships

2016, Jubitz Family Foundation for PeaceVoice (\$26,000)

2015, Jubitz Family Foundation for PeaceVoice (\$10,000)

2014, Jubitz Family Foundation for PSU Foundation (with Erin Niernela) (\$10,000)

2014, Jubitz Family Foundation for PeaceVoice (\$10,000)

2013, Jubitz Family Foundation for PeaceVoice (\$10,000)

2012, Jubitz Family Foundation for PeaceVoice (\$15,000)

2011, Jubitz Family Foundation for PeaceVoice (\$11,000)

2010, Jubitz Family Foundation for PeaceVoice (\$13,000)

2009, Jubitz Family Foundation for PeaceVoice (\$6,000)

2008, Jubitz Family Foundation for PeaceVoice (\$6,000)

2008, Jubitz Family Foundation for PJSA (\$20,000)

2008, Muste Institute (\$2,000)

2007, Jubitz Family Foundation, PeaceVoice (\$5,250)

2006, Jubitz Family Foundation, PeaceVoice (\$26,200)

2006, Jubitz Family Foundation, Iraq Forum (\$4,000)

2006, Jubitz Family Foundation, PeaceVoice (\$7,000)
2006, MacKenzie River Gathering, Iraq Forum (\$1,000)
2006, Newhall Nonviolence Institute, Iraq Forum (\$1,000)
2005, Jubitz Family Foundation, conference, War, Peace and Media (\$3,000)
2005, Newhall Nonviolence Institute, conference (\$1,000)
2004, Jubitz Family Foundation, conference, War, Peace and Media (\$2,000)

Other Teaching, Mentoring and Curricular Achievements

Professional Project Chair, Adam Vogal
Professional Project Chair, David Prater
Professional Project Chair, Virginia Mason
Professional Project Chair, Jennifer Birk
Professional Project Chair, Carol Snell
Professional Project Chair, Michael Lee
Professional Project Chair, Rhea DuMont
Professional Project Chair, Waddah Sofan and Christine Clark.
Professional Project Chair, Michael Anthony and Miranda Williamson
Professional Project Chair, Elizabeth Alexa
Professional Project Chair, Samir Hussein
Professional Project Chair, Stephanie Van Hook
Professional Project Chair, Sa'eed Haji
Professional Project Chair, Heidi Moore
Professional Project Chair, Lane Poncy
Professional Project Chair, Ako Yamakawa
Professional Project chair, Jeffrey Smith
Professional Project committee, Gloria Ngezaho
Professional Project committee, Francesca Medina
Professional Project committee, Matthew Mulica
Professional Project committee, Willem Laven
Thesis committee, Flamur Velhapi
Thesis committee, Sarvenaz Sarkosh
Thesis committee, Eric Berge
Thesis committee, Tobin Krell
Thesis committee, Carrie Stiles
Thesis committee, Meredith Michaud
Thesis committee, Steve Bates
Thesis committee, Jesse Laird
Thesis committee, Justin Zoradi
Thesis advisor, Inger Easton
Thesis advisor, Foday Darboe
Thesis advisor, Emiko Noma
Thesis advisor, Shannon Campbell
Thesis advisor, Heather Goh
Thesis advisor, Adam Sheffer

Thesis advisor, Mike Matelylewich

Thesis advisor, Robin Cook

Thesis advisor, Bryan Wright

Thesis advisor, Jady Bates

Thesis advisor, Khalid Alafif

Thesis advisor, Martha Gaugh

Thesis advisor, David Westbrook

Thesis advisor, Andrea Uribe

Academic advising for Masters Candidates and Conflict Resolution
undergraduate majors and minors ongoing.

Contributions to course development

Two books (*Ecology of war & peace*, *Nonviolent response to terrorism*) were used widely in the field of Peace Studies and Security Studies as texts. Two more books (*Meek ain't weak: Nonviolent power and people of color*, *The lessons of nonviolence*) used occasionally in the field as texts. Chapters in academic texts that may be used in related courses.

Other Community Outreach Achievements

Founder and volunteer Director, PeaceVoice, 2005

Founder, Portland Peace Team, 2013

Co-founder, Shanti Sena peace team network, 2012

Convenor, Deescalation curricula and training conference, Metta Center for Nonviolence, 2012

Corvallis Fellowship of Reconciliation 2012 speaker.

Oregon Fellowship of Reconciliation 2011 conference keynote speaker

Ongoing peace educational presentations at Whitefeather Peace House (average one per month)

Ongoing trainings, Sisters of the Road Cafe

Occasional trainings on nonviolence and deescalation for St. Anthony's Church, Tigard.

Annual address to Humanists of Portland, 2006 & 2007.

Speaker in the Unitarian Universalist four-year study of Just War doctrine, Oct 2007

Nonviolence training, 15 Sept 2006.

Nonviolence trainings, three public sessions, three hours each, 2005.

Presentation at Tualatin High School, spring 2005.

Presentation on Dorothy Day and the Catholic Worker movement, Sunnyside Elementary, March 2005.

Founded Catholic Worker community based on nonviolence and extending hospitality to homeless, May 2004.

Significant Professional Development Activities

Fletcher Summer Institute (Tufts), June 2010

Kroc Institute (Notre Dame) Teaching Peace Symposium, June 2010

Capacity-development training, June-July 1999, Training for Change, Philadelphia

Professionally-related Service

Board of Directors, International Peace Research Association Foundation, 2011-present.

Reviewer, research funding proposals, International Peace Research Association Foundation, 2011-present

Academic Advisory Board, International Center on Nonviolent Conflict, 2010-present

Education and Curricular Advisor, Peace Symbol documentary film, 2010

Governing Council, International Peace Research Association, 2008-present

Co-chair, Peace and Justice Studies Association, 2006-2008

Secretary, Peace and Conflict Studies Consortium, 2005-2007

National Committee for Nonviolent Resistance, Steering Committee, 2005-2006

Secretary, Oregon Peace Institute, 2004-present

Board Member, Oregon Peace Institute, 2001-2008

Board of Directors, Peace and Justice Studies Association, 2000-present

Executive Council, Wisconsin Institute for Peace and Conflict Studies, 1998-2000

National Committee, War Resisters League, 1996-2000

Memberships in Professional Societies

International Peace Research Association

Peace and Conflict Studies Consortium

Peace and Justice Studies Association

Peace History Society

Oregon Peace Institute

Concerned Philosophers for Peace

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Comments:

This appendix accompanies the amicus brief previously filed.

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